No. 90-5635

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

JOHN J. MCCARTHY,

Petitioner,

v.

GEORGE BRONSON, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

APPENDIX TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX TABLE OF CONTENTS

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UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JOHN J. MC CARTHY

VS.

WARDEN, CARL ROBINSON

CIVIL NO. H-83-278 (JAC)

CONSENT TO PROCEED BEFORE A UNITED STATES MAGISTRATE

In accordance with the provisions of Title 28, U.S.C. §636(c), the parties to the above-captioned civil matter hereby voluntarily waive their rights to proceed before a judge of the United States District Court and consent to have a United States Magistrate conduct any and all further proceedings in the case, including trial, and order the entry of a final judgment.

John M°Carthy — 2/28/85
John J. McCarthy, Pro Se — Date

Patricia M. Strong — 2/28/85
Patricia M. Strong, Defendant's Counsel — Date

Date

[Do not execute this portion of the Consent Form if the parties desire that the appeal lie directly to the court of appeals.]

In accordance with the provisions of Title 28, U.S.C. §636(c)(4), the parties elect to take any appeal in this case to a district court judge.

John M°Carthy — 2/28/85
John J. McCarthy, Pro Se — Date

Patricia M. Strong — 2/28/85
Patricia M. Strong, Defendant's Counsel — Date

Date

19

ORDER OF REFERENCE

IT IS HEREBY ORDERED that the above-captioned matter be referred to United States Magistrate F. Owen Eagan for all further proceedings and the entry of judgment in accordance with Title 28, U.S.C. §636(c) and the foregoing consent of the parties.

José A. Cabranes, U.S.D.J.

3/5/85

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U.S. DISTRICT COURT
HARTFORD, CONN.

for me to even have a weapon or to get a hold of one.

THE COURT: You are talking to a judge who has sat here for twelve years, and has listened to cases coming out of segregation for twelve years, and I think it was Justice Hopes that said judges are deemed to know the knowledge of the man on the street, and the man in the street knows that weapons are often found in this prison in the most secured places.

MR. McCARTHY: But those weapons --

THE COURT: Are you asking me to ignore something that I know is commonly found?

MR. McCARTHY: Sometimes it may be found, but they are usually made from something inside of that cell.

THE COURT: That could be right, I don't know. Just with twelve years worth of experience, I know that weapons make their way into that institution, and into all parts of this institution; even those secured areas.

MR. McCARTHY: I have to disagree, your Honor, because I can't recall weapons ever being found in punitive segregation. I have to disagree. At least not when I was there. I never

heard of no inmate being caught with weapons in punitive egregation.

THE COURT: I believe I tried at least six cases that involved --

MR. McCARTHY: Maybe the weapons were planted there.

THE COURT: I don't know that.

MR. McCARTHY: All right. That is what I am saying. We can't go by because you did face a few cases in here where weapons were alleged to have been found.

THE COURT: I have seen the weapons.

MR. McCARTHY: All right. But we don't know really -- what I'm saying, is I don't feel --

THE COURT: Where are you trying to go? I'm not trying to argue with you.

MR. McCARTHY: All I am trying to do is show to the Court that I was in a secured cell, and at the time I had good conduct, and there was no weapon in my cell. These officers fabricated -- either they fabricated their report saying they found a weapon or either they planted a weapon.

Also, I wanted to request Mr. Strom to produce this photograph that Officer Mickiewicz

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

LOCAL RULES FOR UNITED STATES MAGISTRATES

TABLE OF RULES

Rule 1

GENERAL JURISDICTION AND DUTIES OF MAGISTRATES

The following general jurisdiction and duties shall be exercised by each Magistrate appointed by the Court:

(A) The Magistrate shall have jurisdiction over the entire District, with such official station as is fixed by the order of appointment.

(B) The Magistrate shall perform all duties authorized by 28 U.S.C. Section 636 (a), including, but not limited to, the exercise of all powers and duties previously conferred or imposed upon United States Commissioners, and may also conduct extradition proceedings, and exercise misdemeanor trial and sentencing jurisdiction under 18 U.S.C. Section 3401.

(C) The Magistrate shall have authority to assist the Judges of this Court in the conduct of civil and criminal proceedings in all respects contemplated by 28 U.S.C. Section 636(b)-(c), including, but not limited to, exercise of the following duties:

(1) The review and any necessary hearing of, and issuance of recommended decision on, any motion for injunctive relief, to suppress evidence, to permit or to refuse class action maintenance, to dismiss or for summary judgment, or any other similar application in civil or criminal cases potentially dispositive of a claim or defense;

(2) The review, any necessary hearing, and determination of non-dispositive motions, including, but not limited to, those relating to discovery and other matters of procedure;

(3) The review and any necessary hearing of, and issuance of recommended decision on, any prisoner petitions challenging conditions of confinement and any applications for post-conviction relief, such review process to the extent pertinent to include also the issuance of preliminary orders and the conduct of incidental proceedings;

(4) The conduct of pretrial conferences; and

(5) Service as a special master in any appropriate proceedings on order of reference, and a special master reference may be made by consent of the parties without regard to the limiting provisions of Rule 53(b), Fed. R. Civ. P.; trial or other disposition of a civil case by the Magistrate on consent of the parties is further expressly authorized in accordance with 28 U.S.C. Section 636(c) and Rule 4, *infra*.

(D) The Magistrate shall have authority to perform such additional miscellaneous duties as are contemplated by the laws of the United

States, rules of procedure governing District Courts, and Local Court Rules and plans, and may also be assigned such other additional duties, not inconsistent with the Constitution and laws of the United States, as the Court may hereafter require.

Rule 2

REVIEW

(a) The Magistrate's written ruling, pre-trial conference order, or decision or report including proposed findings of fact and recommended conclusions of law, shall be filed with the Clerk, and the Clerk shall forthwith mail a copy to each party. Any party wishing to object must, within ten (10) days after service of such order or recommended ruling on him, serve on all parties, and file with the Clerk, written objection which shall specifically identify the ruling, order, proposed findings and conclusions, or part thereof to which objection is made and the factual and legal basis for such objection. For the purposes of this rule, service of the Magistrate's order or recommended ruling shall be deemed to occur no later than five (5) days after the filing of such order or ruling with the Clerk.

(b) In the event of such objection, in matters acted on by the Magistrate in an advisory capacity under Rule 1(C)(1) or (3), *supra*, the Judge ultimately responsible shall make a *de novo* determination of those portions of the proposed decision to which objection is made, and may accept, reject, or modify the recommended ruling in whole or in part. Such independent determination may be made on the basis of the record developed before the Magistrate, and need not ordinarily involve rehearing, although further evidence may also be received in the reviewing Judge's discretion. Absent such objection, the Judge ultimately responsible may forthwith endorse acceptance of the proposed decision; but the Judge, in his or her discretion, may afford the parties opportunity to object to any contemplated rejection or substantial modification of the proposed decision. In matters determined by the Magistrate under Rule 1(C)(2) or (4), *supra*, the reviewing Judge on timely objection shall set aside any order found to be clearly erroneous or contrary to law, and may, absent such objection, reconsider any matter *sua sponte*.

(c) Review of special master proceedings shall be in accordance with Rule 53, Fed. R. Civ. P., to the extent applicable. In civil cases referred to the Magistrate for trial by the parties' consent, appeals shall be taken as provided by Rule 4, *infra*, in accordance with 28 U.S.C. Section 636(c). Appeals in misdemeanor cases shall conform to the requirements of 18 U.S. C. Section 3402 and the Rules of Procedure for Trial of Misdemeanors before Magistrates.

Rule 3

ASSIGNMENT

All matters to be referred by the Judges to the Magistrates shall be referred in the first instance to the Clerk for appropriate assignment to be made under the supervison of the Chief Judge, bearing in mind such factors as a Magistrate's prior familiarity with proceedings, the seat of Court involved and current caseload allocation. With the assistance of the Magistrates' clerical staff, the Clerk shall be responsible for preparation and issuance of all calendars and notices of proceedings necessitated by such assignments.

Rule 4

CIVIL TRIAL JURISDICTION

(A)(1) Each Magistrate appointed by this Court is designated and authorized to exercise civil trial jurisdiction pursuant to 28 U.S.C. Section 636(c). The parties in any civil action may accordingly consent to trial before a Magistrate, subject to approval by the Judge assigned to the case. On such consent referral, the Magistrate is empowered to conduct all proceedings; *e.g.*, to determine all motions, to preside at trial, and to direct entry of judgment.

(2) When a civil action is commenced, the Clerk shall promptly notify the parties of their right to consent to referral of the case to a Magistrate for disposition; any such choice shall be made voluntarily, without inducement by the Court. The parties' agreement to such a reference is to be communicated in the first instance to the Clerk by written stipulation, which shall be forwarded to the assigned trial Judge for discretionary consideration. That stipulation must additionally state the parties' choice of appellate review method pursuant to 28 U.S.C. Section 636(c), by (1) direct appeal to the Court of Appeals, or (2) appeal in the first instance to the referring Judge, and thereafter, by petition only, to the Court of Appeals.

(B)(1) A direct appeal to the Court of Appeals shall be taken in the same manner as from any other judgment or reviewable order of this Court.

(2) The scope of an appeal to the referring Judge shall be the same as on an appeal from a judgment of this Court to the Court of Appeals; such appeal shall be taken as herein provided, subject on prompt application to such modification of time limits and procedures in a particular case as may be found appropriate by the Judge in the interest of justice. Dismissal of the appeal may be directed for failure to comply with this Rule 4 or related Court orders.

(3) Appeal to the referring Judge shall be taken by filing a notice of appeal with the Clerk within thirty (30) days after entry of the Magistrate's judgment, or within sixty (60) days after such judgment's entry if the United States or any officer or agency thereof is a party; if a timely notice of appeal is filed, any other party may file a notice of appeal within fourteen (14) days thereafter. The Clerk shall forthwith mail copies of a notice of appeal to all other parties. Any attendant stay application shall be made to the Magistrate in the first instance. The record on appeal shall consist of the original papers and

exhibits filed with the Clerk, the docket and any transcript of proceedings before the Magistrate. Within ten (10) days after filing the notice of appeal, the appellant shall make arrangements in the first instance for the production of any transcript deemed necessary. Within thirty (30) days after the notice of appeal is filed, the appellant's brief shall be served and filed; the appellee's brief shall be served and filed within thirty (30) days thereafter. Absent scheduling of oral argument on the Judge's own initiative, the appeal will be decided on the papers unless good cause for allowance of oral argument is shown by written request submitted with the brief.

(C) These provisions shall be construed to promote expeditious, inexpensive and just decision, and are subject to any controlling uniform procedures for such appeals as may be adopted hereafter by rule or statute.

Memo of Decision Filed

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JOHN J. MC CARTHY :

VS. : CIVIL NO. H-83-278 (JAC)

CARL ROBINSON, ET AL :

RECOMMENDED FINDINGS OF FACT AND MEMORANDUM OF DECISION

At all relevant times, the plaintiff was a prisoner at the Connecticut Correctional Institution at Somers (hereinafter CCIS). He brings this action pro se pursuant to 42 U.S.C. § 1983, alleging that the defendants violated his fourteenth amendment due process rights and his eighth amendment right to be free from cruel and unusual punishment when they used excessive force to remove him from his cell. Additionally, plaintiff claims that defendants committed an assault and battery against him in violation of state law. On December 22, 1986, this court determined that plaintiff's complaint and subsequent amendments set forth one issue for trial, that being: the constitutionality of defendants' use of a chemical weapon. See Ruling on Pending Motions at 3, 4 (filed December 22, 1986).

At the start of trial, the court noted that both Warden Robinson and Commissioner Manson are deceased. Accordingly, Warden Bronson and Commissioner Meachum were substituted in their official capacities for the deceased defendants. Additionally, plaintiff withdrew the complaint against Officers Falk, Bond, Flowers and

Texeira. Thus, the sole remaining defendants are Warden Bronson, Commissioner Meachum, Lt. Tozier, Officer Mickiewicz, Officer Lusa and Officer George. Plaintiff seeks declaratory and injunctive relief, compensatory damages in the amount of $220,000, punitive damages in the amount of $600,000 and costs.

FINDINGS OF FACT

In accordance with the provisions of 28 U.S.C. § 636(c), this matter was tried before this Magistrate over an eight day period starting March 24, 1988 and ending May 19, 1988. The following findings of fact were established by testimony elicited and exhibits submitted at trial:

1. The plaintiff is a convicted prisoner presently serving a ten to twenty year sentence for larceny in the first degree and burglary in the third degree. Additionally, plaintiff faces a six year consecutive sentence for six counts of burglary in the third degree and six counts of larceny.

2. On July 13, 1982, plaintiff was housed in cell F-36. Cell F-36 is the last cell at the end of death row. It is referred to as the "death cell" and is separated from other cells in segregation by a wall with a door.

3. In 1982, this area was used for isolation purposes where the most salient individuals were placed if they posed a threat or caused a disruption.

4. At approximately 9:00 A.M. on July 13, 1982, Lt. Tozier notified plaintiff that he would be moving to cell F-85 in administrative segregation.

5. On July 13, 1982, Lt. Tozier was director of the special offenders program which covered the segregation and protective custody units. The director of the special offenders program was responsible for all the activities in three special units. In that capacity, Lt. Tozier was considered to be a shift supervisor and had authority to order the use of a chemical weapon.

6. Prior to July 13, 1982, Lt. Tozier received training in the use of chemical munitions at the Correctional Training Academy and as part of his supervisory training and review. He has had fourteen years of on the job training, and used chemical agents numerous times in his career.

7. Shortly after lunch, an inmate tierman for F Block named Mike Ceretta, instructed plaintiff to pack his belongings in preparation for his cell transfer. Approximately, twenty minutes later, Correctional Officer Mickiewicz visited plaintiff and asked if he was packed-up.

8. Plaintiff believed originally that Officer Mickiewicz relayed a direct order through inmate Ceretta to pack-up and prepare for his cell change. Later, when speaking directly with Officer Mickiewicz, plaintiff did not construe the instructions to pack-up as a direct order because Officer Mickiewicz did not specify that it was a direct order per se.

9. Plaintiff refused to pack his property. Instead, he indicated that he wanted to know why he was being moved and he requested to see a supervisor.

10. Officer Mickiewicz called Lt. Tozier and informed him that plaintiff refused to move. Lt. Tozier instructed Officer Mickiewicz to contact the hall keeper for help.

11. At approximately 2:30 P.M. on July 13, 1982, plaintiff heard other inmates state that the guards were forming a "group" and "rolling".

12. Plaintiff believed the guards were coming to get him. He panicked and tied his cell door closed with pieces of clothesline and jammed a piece of plastic from a plastic spoon into the keyslot.

13. Correctional Officers Mickiewicz, Lusa, George and Flowers entered F. Block at approximately 2:30 P.M. on July 13, 1982. Before entering the death row area, they formulated a game plan for extracting plaintiff from his cell. While discussing how to remove plaintiff, the officers were joined by Lt. Tozier.

14. When the Lieutenant arrived, a description was provided of plaintiff's cell area, including the fact that plaintiff's cell bars were tied shut and that plaintiff was in an angry, agitated state.

15. It was decided that Lt. Tozier would remain out of sight of the plaintiff so as to not aggravate the situation. The officers would ask plaintiff to voluntarily come out of his cell and issue

an order if necessary. If he refused, the correctional officers would enter the cell and remove the plaintiff.

16. While the correctional officers spoke with the plaintiff, Lt. Tozier remained in the proximity of F-36; positioned just outside the doorway to the annex area of F-36.

17. Plaintiff was standing in his cell holding the mattress from his bed. The officers cut the twine tied on the cell door.

18. Officer George asked plaintiff what the problem was and asked him to come out peacefully at least twice. The officers spent approximately ten to fifteen minutes trying to coax plaintiff out of his cell. Officer Mickiewicz then ordered plaintiff to come out.

19. Plaintiff refused to exit the cell and made threatening statements consisting of "You will have to come and get me," and "Someone is going to get hurt."

20. Officer Lusa approached plaintiff's cell door and placed a tear gas "duster" on the bars of the door.

21. Officer Lusa was the hall keeper of F Block on July 13, 1982. As the hall keeper, Officer Lusa's duties included responding to situations involving moving inmates, troublesome inmates, hang suicides, falls, and alarms.

22. When hall keepers responded to a call to remove an inmate from a cell, they would always bring a bag with necessary tools, inclusing tear gas and mace. Officer Lusa had substantial experience with the tear gas duster and had used it on numerous occasions prior

to July 13, 1982.

23. When plaintiff saw the duster, he used the mattress to shield himself and made no further response.

24. Plaintiff suddenly lunged toward a specific area of his cell. On the belief that plaintiff was lunging for a weapon, and at the verbal command of Lt. Tozier, Officer Lusa deployed the tear gas duster.

25. Officer Lusa sprayed the duster once for about three seconds while standing approximately six feet from the plaintiff. A fog-like dust enveloped plaintiff and he ceased to resist.

26. The piece of plastic was freed from the lock and Officers Mickiewicz, George and Lusa entered the gas-filled cell. Officer Mickiewicz handcuffed plaintiff. Physical force was not used as plaintiff did not resist at that point.

27. Officer Mickiewicz quickly escorted plaintiff to isolation cell F-43 followed by the other officers. The officers and plaintiff were in the gassed cell for approximately two to five minutes.

28. The door to cell F-36 was closed and locked so that tear gas dust would not disperse and to protect the plaintiff's property. Windows were opened and fans were in place.

29. At approximately 3:30 P.M., plaintiff arrived at the isolation area where his handcuffs were removed. He was stripped, searched, and then put into cell F-43. No rashes, burns or signs

of redness were observed on plaintiff's body.

30. When plaintiff arrived in cell F-43 he requested and demanded a shower. Because plaintiff was still in an agitated and violent state of mind, Lt. Tozier decided it would not be appropriate to take plaintiff out of F-43 immediately following the gassing incident. Plaintiff was informed that he would not get a shower until he calmed down.

31. Plaintiff was not in physical danger because there was hot and cold running water in plaintiff's cell. Lt. Tozier did not order that plaintiff's water be shut off. Considering the amount of gas used and the availability of water, there was no need to send a medic to see plaintiff at that time.

32. Approximately three hours after the incident, when Lt. Tozier was sure that plaintiff had calmed down sufficiently, he authorized the second shift supervisor to shower plaintiff.

33. Lingering gas fumes filtered into the F Block segregation unit annoying some of the inmates and inciting them to throw milk cartons and refuse from their cells. There was no large scale disturbance.

34. At approximately 4:00 P.M., Officer Dudek came on duty for the second shift in F Block. At that time, there was no smell of tear gas in the segregation unit.

35. Lt. Tozier left a verbal order for the second shift officers to search plaintiff's cell. At approximately 9:30 P.M., Officers

Dudek and Higgins went to search cell F-36.

36. When correctional officers pack and secure an inmate's belongings, they generally look for contraband as well. Two officers always enter an inmate's cell together when performing a search or "shakedown" so that one officer acts as a witness to the actions of the other officer.

37. When they arrived at the partitioned separating the death row cells from the segregation cells, they found the door locked and secured.

38. Officers Dudek and Higgins unlocked the door, entered the death row area and locked the door behind them. They packed-up plaintiff's property and exited from plaintiff's cell into the death chamber (where property is stored).

39. In the death chamber, they searched through plaintiff's property. Officer Higgins inspected a cereal box in which he found a shank, or homemade knife, stuck underneath a flap of the box. The shank was approximately ten inches long with a six inch blade. Officer Dudek took the shank, put it in his pocket, and turned it over to the shift supervisor.

40. Between 3:00 P.M. and 12:00 A.M., there was no opportunity for anyone to enter plaintiff's cell. The outer door to plaintiff's cell area was locked and all inmate tiermen were locked in their cells for a "count" at the time of the incident and at 4:00 P.M. when Officer Dudek came on duty.

41. On the evening of July 13, 1982, Nurse Rogal routinely toured the segregation unit. At approximately 9:30 that same night, plaintiff received a medical exam and was sent Caladryl ointment in response to his complaint of itchy skin.

42. On the following day, July 14, 1982, Nurse Sharon Snyder routinely toured the segregation unit. Plaintiff asked Nurse Snyder for some Tylenol. He did not complain of chemical burns or skin irritations.

43. On July 15, 1982, Dr. Carl Johnson and Nurse Sharon Snyder toured the segregation unit. Dr. Johnson examined plaintiff and noted plaintiff's complaint as a questionable chemical burn under his right arm, up his side, and in his hair. Dr. Johnson prescribed "kenalog" cream.

44. On July 16, 1982, during the course of Nurse Snyder's daily visit to segregation, plaintiff requested a decongestant.

45. On July 19, 1982, plaintiff requested more Tylenol from Nurse Snyder.

46. On July 22, 1982, during another "seg check" by Dr. Johnson, plaintiff complained of an underarm irritation. The doctor prescribed cream to be applied three times a day.

47. 47. On July 26, 1982, plaintiff's prescription for decongestion was refilled.

48. Plaintiff was not taken to the hospital for treatment after

the gassing incident. To the extent that plaintiff's injuries were treated with ointments and Tylenol, they were insignificant in nature.

49. In 1982, only two chemical weapons were utilized at CCIS; mace and the 271 tear gas duster. At that time, the word "duster" had a specific meaning and was used to refer to the 271 tear gas duster. The 271 duster was designed for interior use and specifically for use in correctional facilities.

50. The active chemical agent in mace and the 271 tear gas duster is choloracetophenone, or "CN". CN is a lacrimating agent which induces profuse watering of the eyes. The canister containing the CN arrived at CCIS premixed by the manufacturer. The mixture consists of "anti-caking agent" and 64% CN. There was no way to influence the chemical mixture inside the canister.

51. The proper deployment method of the 271 duster is to aim waist high at the individual. When a barrier is used as a shield, the 271 duster should be aimed at the barrier.

52. In order for mace to be effective, it must make contact with the skin. When an inmate uses a blanket or bedding materials as a barricade, mace is considered ineffective and its use could place the officers at a risk.

53. Generally, the 271 duster was used as a preventive measure. When properly used, the 271 duster was not considered any more or less dangerous than mace or any other device in law enforcement.

54. The effect of the tear gas dust is to cause the eyes to burn and sting. The feeling is uncomfortable and unpleasant, but the sensation is short-term and does not cause lasting damage.

55. The tear gas dust is removed by shaking it from exposed clothing and applying water to the skin. Because the dust is very superficial, water removal is the recognized first aid treatment for chemical agent exposure.

56. On July 13, 1982, there were administrative directives in effect authorizing the use of force and the use of chemical weapons against inmates.

57. When deciding whether to authorize the use of a chemical weapon, a supervising officer considers a number of factors, including: (i) the potentially assaultive and aggressive nature of the inmate, (ii) whether the inmate is in a cell refusing to come out, and (iii) whether the inmate is threatening the officers with physical harm.

58. Additionally, there are three or four reasons for using a chemical weapon on an inmate. One reason is to aid in the movement of an inmate from an area that they control to an area controlled by the officers.

59. In light of the kind of bars on plaintiff's cell, the placement of foreign objects in the keyway, and the clothesline tied on the cell door, plaintiff was in control of the area of his cell.

60. Because plaintiff could not be evacuated in the event of a fire or emergency, it would not have been proper or appropriate for defendants to walk away from the situation.

61. On June 2, 1982, plaintiff wrote to Assistant Warden Bronson and Commissioner Manson complaining of harrassment by Lt. Tozier and requesting reconsideration of his segregation status.

62. Assistant Warden Bronson responded stating that he found Lt. Tozier's actions were appropriate and consistent with procedure. Additionally, he informed plaintiff that the Special Offenders Program classification committee would recommend his return to general population if he remained misconduct free for a period of thirty days.

63. Commissioner Manson informed plaintiff that his placement in segregation was appropriate due to plaintiff's ongoing and consistent disciplinary record. The Commissioner indicated that plaintiff was in the least desirable of cells because he destroyed state property. Additionally, Commissioner Manson noted that plaintiff's record in segregation had been "horrendous." When plaintiff demonstrated an ability to abide by prison rules, he would be released into population. In the interim, plaintiff was instructed that he should not "put [his] feelings on Lt. Tozier or any other person, staff or inmate."

64. Lt. Tozier was unaware of plaintiff's letters to the Assistant Warden and the Commissioner. He received no reprimand with respect to plaintiff's allegations. In fourteen years of

service, Lt. Tozier was never reprimanded in relation to his duties.

65. On July 13, 1982, Lt. Tozier made a discretionary decision to use force based on the need to maintain order, discipline, and the security of F Block and the institution. The decision was made only after Lt. Tozier arrived on the scene. Lt. Tozier's decision was based on his evaluation of the situation and his knowledge of the inmate.

66. As director of the Special Offenders Program, Lt. Tozier reviewed plaintiff's misconduct record for special offender classification meetings. From a period of 1/6/82 to 7/13/82, plaintiff received approximately fifteen misconduct reports involving charges of tampering with locking devices, destroying state property, possession of drugs and intoxicating substances and possession of a weapon.

67. Lt. Tozier's decision to use a chemical agent was not made in order to punish plaintiff, cause unnecessary pain, or in retaliation for the letters plaintiff sent.

68. The primary reason for the chain of events that occurred on July 13, 1982 was plaintiff's refusal to obey lawful orders issued by the defendants. When an inmate is ordered to change cells he must follow the order then make his appeal to the supervisor. Plaintiff failed to comply with a lawful order and made threatening statements.

69. Under the circumstances, use of the 271 tear gas duster

was in the best interests of those involved. The 271 duster was safer and more humane than physical force which might have resulted in injury to the officers as well as the plaintiff. The barricade raised by plaintiff necessitated using the 271 duster rather than mace. Under the circumstances, there were not less forceful means to remove plaintiff from his cell.

70. The use of the 271 duster was appropriate and proper. An excessive amount of gas was not expelled. The use of force was reasonably related to the need to remove plaintiff from his cell and restore order and discipline to the block.

DISCUSSION

As stated above, the plaintiff claims that defendants used excessive force to remove him from his cell and caused serious injuries as a result. Plaintiff asserts that defendnats' actions subjected him to cruel and unusual punishment in violation of the eighth amendment and deprived him of substantial liberties without due process of law in violation of the fourteenth amendment.

I. Eighth Amendment Claim

The Second Circuit has set forth the following factors as useful in determining whether alleged excessive force amounts to a constitutional violation.

> In determining whether the constitutional line has been crossed, a court must look to such factors as the need for the application of force, the relationship between the need and the amount of force

> that was used, the extent of the injury inflicted, and whether force was applied in a good faith effort to maintain or resotre discipline or maliciously and sadistically for the very purpose of causing harm.

Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir.), cert. denied, 414 U.S. 1033 (1973).

When proving an eighth amendment violation, the plaintiff has an extremely difficult burden. "'After incarceration, only the 'unnecessary and wanton infliction of pain'...constitutes cruel and unusual punishment forbidden by the Eighth Amendment.'" Whitley v. Albers, 475 U.S. 312, 319 (1986)(quoting Ingraham v. Wright, 430 U.S. 651, 670 (1977)). "[C]onduct that does not purport to be punishment at all must involve more than ordinary lack of due care for the prisoner's interests or safety." Id. Thus, the infliction of pain as a security measure is not a constitutional violation simply because it may later appear unreasonable. Id. The test turns on "whether force [was] applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." Glick, 481 F.2d at 1033.

Examination of the record in this case does not reveal credible evidence to support plaintiff's claims. The record indicates that plaintiff was notified at least twice that he would be changing cells sometime during the day of July 13, 1982. Plaintiff was asked repeatedly to move voluntarily and then was ordered to come out of

cell. Regardless of his justifications for refusing to move, plaintiff had no constitutionally protected right to disobey a lawful order from a prison official. Nor did plaintiff have a constitutional right to know why he was being moved. Finally, plaintiff had no constitutional right to remain incarcerated in a particular cell. See Olim v. Wakinekona, 461 U.S. 238 (1983); Burr v. Duckworth, 547 F. Supp. 192, 197 (N.D. Ind. 1982), aff'd mem., 746 F.2d 1482 (7th Cir. 1984).

Plaintiff contends that defendants used the 271 duster solely as a disciplinary tool because he "stray[ed] from the letter of the prison code." Clearly, this was not a situation where force was used to punish plaintiff for violating the Code of Penal Discipline. Plaintiff's actions in barricading himself in his cell and jamming the cell lock created a threat to the safety of the institution as well as to himself. In the event of an emergency or a fire, plaintiff could not have been evacuated quickly and safely. Additionally, plaintiff made threatening comments to the officers and had a history of misconduct suggesting a potentially assaultive or aggressive nature. In light of these circumstances, this court cannot find that use of the chemical weapon was unauthorized or unreasonable.

Plaintiff alleges that the amount of chemical agent used was excessive and resulted in severe burns and open, raw, sores. However, the record indicates that Officer Lusa sprayed the tear gas

for approximately two to three seconds. Less than one hour later, when Officer Dudek reported for duty, there was no smell of tear gas outside the segregation unit. Further, none of the officers who participated in the incident required medical treatment or showers after being exposed to the same amount of gas. Moreover, plaintiff's medical records indicate that plaintiff experienced only "itchy skin" a few hours after the incident and minor skin irritation lasting approximately one week. The skin rashes were treated with creams and ointments and did not require transferring plaintiff to an outside facility or the hospital unit. On at least three occasions during the two weeks following the incident, plaintiff did not even mention discomfort from the gassing and requested only Tylenol and decongestants from the medical staff.

Lastly, plaintiff argues that Lt. Tozier's decision to use the 271 tear gas duster was malicious, retaliatory, and made in bad faith. There is no evidence in the record to support such a claim. Of the fifteen misconduct reports received by palintiff prior to the incident, only one had been issued by Lt. Tozier. Furthermore, plaintiff himself testified that while other inmates and guards called him names and verbally abused him, Lt. Tozier never uttered derogatory remarks toward plaintiff. Finally, in response to plaintiff's complaints regarding Lt. Tozier, both Commissioner Manson, and Warden Bronson found the Lieutenant's behavior to be

appropriate and beyond reproach. Accordingly, plaintiff has failed to demonstrate that the use of force was applied maliciously or sadistically for the very purpose of causing harm.

II. Fourteenth Amendment Claim

Plaintiff further proposes liability alleging that he was deprived of a state created liberty interest without due process of law in violation of the fourteenth amendment. It would be difficult to comprehend conduct which would "shock the conscience" of this court and so violate the fourteenth amendment, yet not also be "'inconsistent with contemporary standards of decency' and 'repugnant to the conscience of mankind,' in violation of the Eighth." Whitley, 475 U.S. at 327 (quoting Estelle v. Gamble, 429 U.S. 97, 103, 106 (1976))(citation omitted).

Simply stated, in the prison security context, "the Due Process Clause affords [the plaintiff] no greater protection than does the Cruel and Unusual Punishment Clause." Whitley, 475 U.S. at 327. Plaintiff has failed to demonstrate that defendants' use of a chemical weapon was unreasonable or unathorized. Accordingly, the court concludes that the due process clause does not serve as an alternative basis for liability.

CONCLUSION

For the foregoing reasons, plaintiff has failed to establish that defendants' use of a chemical weapon violated his constitutional

rights under the eighth or the fourteenth amendments. Accordingly, judgment shall enter in favor of the defendants.

Any objections to this report and recommendation must be filed with the Clerk of Courts within fifteen (15) days of receipt of this notice. Failure to file objections within the specified time waives the right to appeal the District Court's order. 28 U.S.C. § 636.

Dated at Hartford, Connecticut, this 22nd day of May 1989.

F. Owen Eagan
United States Magistrate

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JOHN J. MC CARTHY :

VS. : CIVIL NO. H-83-278 (JAC)

CARL ROBINSON :

RULING ON MOTION FOR REAPPOINTMENT OF COUNSEL

When the petitioner commenced this action in April 1983, the court appointed counsel for him. However, on January 31, 1985, th court permitted appointed counsel to withdraw after the plaintiff filed a grievance against him. In October 1986, the plaintiff again asked the court to find and appoint counsel for him. On October 28, 1986, after careful consideration of the possible meri of the plaintiff's case and other relevant circumstances, the court denied the plaintiff's motion for appointment of another attorney. See Hodge v. Police Officers, 802 F.2d 58 (2d Cir. 1986 In denying counsel, the court noted, inter alia, that "the plaintiff's chances of ultimate success are meager" and that the court "is unable to find any attorney who is willing to take the plaintiff's case because of [his] reputation for abusing all past appointed counsel." Ruling on Motion for Appointment of Counsel, October 28, 1986, at 3-4.

On April 10, 1987, the plaintiff filed a "motion for reappoin ment of counsel." After the court denied the plaintiff's first motion for appointment of counsel, prison officials transferred th plaintiff from the Connecticut Correctional Institution in Somers to the United States Penitentiary in Terre Haute, Indiana. The plaintiff cites this transfer as a new reason supporting his request for appointment of counsel.

As already stated, the court has carefully examined the plaintiff's request for appointment of counsel; it will not reiterate facts and findings which remain unchanged as a result of the plaintiff's out of state transfer. The plaintiff's action has not become more meritorious simply because the plaintiff resides in a new state. Nor has the plaintiff, an experienced pro s litigator, suddenly become less able to pursue this action on this own. Finally, the court is still unable to find a capable attorne who is willing to represent this plaintiff.

The court has already met its obligation to the plaintiff by appointing experienced and competent counsel for him on one occasion. See U.S. ex rel. George v. Lane, 718 F.2d 226 (7th Cir. 1983). When an inmate is transferred from state custody to a federal institution located in another state, officials must provide an inmate with an adequate law library or adequate aid from

persons trained in the law applicable to the action. See Bounds v Smith, 430 U.S. 817 (1977); Brown v. Smith, 580 F. Supp. 1576, 157 78 (M.D. Pa. 1984). The instant action involves issues of federa law, not Connecticut law. The plaintiff sets forth no facts which indicate that the law library at Terre Haute is inadequate for any remaining research he may wish to do. As long as the Terre Haute law library has adequate resources for the plaintiff to conduct research concerning the use of mace in the prison setting, the plaintiff's right to access to adequate legal assistance has been protected.

The motion for reappointment of counsel is denied.

Dated at Hartford, Connecticut, this 2nd day of June 1987.

F. Owen Eagan
United States Magistrate

DEC 24 %

ATTORNEY GENERAL'S OFFICE
340 CAPITOL AVE. HTFD. DISTRICT OF CONNECTICUT

FILED

JOHN J. McCARTHY, Plaintiff

v.

CARL ROBINSON, Et al. Defendants

CIVIL No. H-86-[illegible]CR

RULING ON PENDING MOTIONS

The plaintiff, an inmate at the Connecticut Correctional Institution in Somers ("CCIS"), has brought this action pro se and in forma pauperis pursuant to 42 U.S.C. Sec. 1983. Included as defendants are the warden at CCIS, as well as several correctional officers. The plaintiff claims that the defendants violated his constitutional rights when they sprayed him with "Big Red," a chemical weapon similar to mace. Presently pending are: (1) Plaintiff's Motion for a Preliminary Injunction; (2) Plaintiff's Motion for Copies of all Pretrial Transcripts; and, (3) Defendants' Objection to the Plaintiff's Jury Demand in the Second Amended Complaint.

I. Plaintiff's Motion for a Preliminary Injunction

On October 7, 1986, the plaintiff filed a motion seeking an order enjoining prison officials from transferring him to another correctional facility. He claims that the defendants arranged this transfer so that his legal material would be lost in transit, thus impeding his access to the court. He further states that officials effectuated this transfer in retaliation for the numerous legal actions the plaintiff has filed against Department of Corrections employees. However, by October 6, 1986, the plaintiff already had been transferred to the United States Penitentiary in Terre Haute, Indiana. See Affidavit of Commissioner Lopes, Exhibit A.

Since the plaintiff seeks to block a transfer which has already occurred,

his request for injunctive relief is moot. See Lynch v. Coughlin, 784 F.2d 461 (2d Cir. 1986). Moreover, an inmate ordinarily has no constitutionally protected interest in remaining in one facility as opposed to another. Olim v. Wakinekona, 461 U.S. 238 (1983); Meachum v. Fano, 427 U.S. 215 (1976). In this particular case, the plaintiff's allegation that his transfer was effectuated for an improper reason does not change this conclusion. The plaintiff, while confined at CCIS, has received over forty misconduct reports since 1981. He has engaged extensively in conduct which has jeopardized institutional order and security. Prison officials have transferred the plaintiff to another institution in order to maintain order at CCIS, as well as to offer the plaintiff an opportunity to get a fresh start in a different general prison population. See Lopes Affidavit. Officials are afforded wide-ranging deference in executing practices designed to preserve internal order and security. Bell v. Wolfish, 441 U.S. 520 (1979). Since the decision to transfer the plaintiff is supported by a valid reason, the fact that it may have temporarily hindered the plaintiff's ability to file papers in this Court does not render the transfer unlawful. See Sher v. Coughlin, 739 F.2d 77 (2d Cir. 1984). The plaintiff's motion for an injunction is denied.

II. Plaintiff's Motion for a Copy of Pretrial Transcripts

The plaintiff has requested "from this Court a copy of all the pretrial transcripts, except for when Attorney Brian Smith was representing [him]." Plaintiff's Motion. Since the plaintiff has brought this action in forma pauperis, the Court assumes that he wants these copies free of charge. The plaintiff provides two reasons for this request: (1) He needs the transcripts to support his motion to enjoin his transfer; and, (2) He wants to view the pretrial proceedings so he can prepare a new civil rights action.

The transcripts which the plaintiff seeks would cover proceedings before Magistrate Eginton. Generally, the Magistrate does not record pretrial conferences or other pretrial proceedings held at Somers Prison. In short, the documents which the plaintiff seeks do not exist.

Moreover, even if these documents did exist, the plaintiff has not demonstrated a present entitlement to free copies of them. The Court is authorized to provide a transcript for a person who has been permitted to appeal in forma pauperis if the trial judge or circuit judge certifies that the appeal is not frivolous. 28 U.S.C. Sec. 753(f). There is no clear statutory authority which suggests that the plaintiff is entitled to any trial-related transcripts prior to an appeal from a judgment of the district court. See Toliver v. Community Action Commission, 613 F.Supp. 1070, 1072 (S.D.N.Y. 1985). The right to proceed in forma pauperis does not carry with it a right to obtain copies of court documents to search for possible errors or to use for prospective litigation. United States v. Houghton, 388 F.Supp. 772 (N.D. Tex. 1975).

The plaintiff's request for a copy of the pretrial transcripts is denied.

III. Defendants' Objection to Plaintiff's Jury Demand

In April, 1983, the plaintiff filed his original complaint. In that complaint, he alleged that the defendants' use of mace violated his constitutional rights. He did not request a jury trial. In April, 1985, he filed an amended complaint. This complaint added four parties and substituted one, but raised no new issues. The amended complaint contained no request for a jury trial. On July 8, 1985, the same defendants were served with a second amended complaint which included a jury demand. Although more detailed, this complaint contained no new issues.

A plaintiff must demand a jury trial on any issue no later than ten days

after the service of the last pleading directed to such issue. Fed. R. Civ. P. 38(b). Failure to make a timely demand constitutes a waiver of that right on all issues in the complaint. Fed. R. Civ. P. 38(d). A subsequent amendment of the original complaint does not revive the right to a jury trial unless the amendment changes the issues set forth in the original complaint. Lanza v. Drexel and Co., 479 F.2d 1277, 1310 (2d Cir. 1973). Likewise, the addition of a co-defendant does not automatically revive a previously waived jury trial right unless new issues are presented in the amendment. State Mutual Life Assurance Co. of America v. Arthur Andersen and Co., 581 F.2d 1045, 1049 (2d Cir. 1978).

The plaintiff did not claim his right to a jury trial until more than two years after filing his original complaint. Although his complaints have been progressively more detailed, and have added more defendants, all have consistently set forth the constitutionality of the use of mace as the issue to be resolved. Accordingly, the plaintiff is not entitled to a jury trial.

Conclusion

1. Plaintiff's motion for an injunction is DENIED.

2. Plaintiff's motion for pretrial transcripts is DENIED.

3. Defendants' objection to plaintiff's request for a jury trial is SUSTAINED.

SO ORDERED.

Dated at New Haven, Connecticut, this 22d day of December, 1986.

JOSE A. CABRANES
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

JOHN J. McCARTHY :

v. : CIVIL NO. H-83-278(JAC)

CARL ROBINSON, et al. :

RULING ON PENDING MOTIONS

This is a pro se action brought under 42 U.S.C. § 1983 by a plaintiff who at all relevant times was a prisoner at the Connecticut Correctional Institution at Somers ("Somers"). On April 11, 1983, the same date the complaint was filed, I referred this case to Magistrate F. Owen Eagan for all pretrial proceedings. On February 28, 1985 plaintiff, acting pro se, and defendant's counsel both signed a "Consent to Proceed Before a United States Magistrate" form consenting to trial before a United States Magistrate pursuant to 28 U.S.C. § 636(c), and on March 5, 1985 I approved this form. Trial before Magistrate Eagan began at Somers on March 24, 1988, at which point plaintiff refused to sign another "Consent to Proceed Before a United States Magistrate" form. After the close of trial and briefing by both sides, Magistrate Eagan on May 23, 1989 issued a document styled "Recommended Findings of Fact and Memorandum of Decision," and on June 19, 1989 I endorsed this document as follows:

> Absent a timely objection to the Magistrate's recommended ruling, see 28 U.S.C. § 636(b)(1) and Rule 2 of the Local Rules for U.S. Magistrates (D. Conn.), and for the reasons stated by the Magistrate, the Recommended Findings of Fact and Memorandum of Decision is hereby accepted and adopted as the decision of the court. Accordingly, judgment shall enter in favor of the defendants. It is so ordered.

The Clerk entered judgment in favor of the defendants on June 19, 1989. Both sides have now filed various motions.

Because my June 19 endorsement order contained a citation to an inappropriate subsection of the United States Code, and because it was not particularly clear in any event, I must at the outset discuss the procedural posture in which this case now appears. My March 5, 1985 order approving the "Consent to Proceed Before a United States Magistrate" form had the necessary effect of amending the referral to Magistrate Eagan to include the conducting of the trial of this case, pursuant to 28 U.S.C. § 636(c) and Rule 4 of the Local Rules for United States Magistrates (D. Conn.) ("Local Rules"). Because plaintiff refused to sign another "Consent to Proceed Before a United States Magistrate" form on the first day of trial, however, Magistrate Eagan chose not to direct the entry of judgment after trial, as he was authorized to do by 28 U.S.C. § 636(c)(1) and Rule 4(A)(1) of the Local Rules. Instead, Magistrate Eagan issued a document entitled "Recommended Findings of Fact and Memorandum of Decision," essentially acting as a special master pursuant to his powers under 28 U.S.C. § 636(b)(2) and Rule 1(C)(5) of the Local Rules. This prudent course of action by Magistrate Eagan was entirely

appropriate.[1] Absent a timely objection, see Fed. R. Civ. P. 53(e)(2) and Rule 2(c) of the Local Rules, I adopted the findings of fact recommended by Magistrate Eagan. These facts clearly compelled the entry of judgment in favor of defendants.

With this overview of the procedural posture of the case, I can now turn to the pending motions:

1. Plaintiffs' [sic] Motion for Relief From Judgement [sic] (filed June 29, 1989) -- Plaintiff moves, presumably under Fed. R. Civ. P. 60(b)(6), for relief from the judgment entered June 19, 1989, on the grounds that he did not receive Magistrate Eagan's Recommended Findings of Fact and Memorandum of Decision until June 7, 1989 and therefore the court did not give him sufficient time to file objections to that report prior to entering judgment. Plaintiff did file an objection to the Recommended Findings of Fact and Memorandum of Decision on June 22, 1989.

Assuming for the argument only that valid objections to the Recommended Findings of Fact and Memorandum of Decision would justify relief from the judgment under Fed. R. Civ. P. 60(b)(6), or would justify alteration of the judgment under

[1] I believe it also would have been perfectly proper for Magistrate Eagan to continue to act under 28 U.S.C. § 636(c) and Rule 4 of the Local Rules. Once a case is referred to a magistrate under § 636(c), a party cannot withdraw his consent and demand that the case return to the district judge. Fellman v. Fireman's Fund Insurance Company, 735 F.2d 55, 57-58 (2d Cir. 1984). Such a rule is necessary to avoid "magistrate shopping" by parties, withdrawing their consent if they are unhappy with the particular magistrate to whom the referral went.

Fed. R. Civ. P. 59(e), I still cannot grant this motion. I am required to accept the findings of fact recommended by Magistrate Eagan in this case, in which he essentially acted as a special master, unless they are "clearly erroneous." See Fed. R. Civ. P. 53(e)(2); Equal Employment Opportunity Commission v. Local 638, 700 F. Supp. 739, 743 n.1 (S.D.N.Y. 1988). I have thoroughly reviewed the objections raised by plaintiff in Plaintiffs [sic] Objection to the Magistrates' Recomended [sic] Findings and Memorandum of Decision Dated May 23/1989 (F. Owen Eagan) (filed June 22, 1989) and in Plaintiffs' [sic] Memorandum in Support of his Objection to the Magistrates' Recomended [sic] Findings of Facts and Memorandum of Decision Dated May 23/1989 Re: 28 U.S.C. 636(c) (filed June 22, 1989).[2] I cannot conclude that any of the factual findings challenged by plaintiff is "clearly erroneous." Even upon a de novo determination I would reach the same conclusions as the Magistrate regarding the matters to which there has been objection.

Accordingly, Plaintiffs [sic] Objection to the Magistrates' Recomended [sic] Findings and Memorandum of Decision Dated May 23/1989 (F. Owen Eagan) (filed June 22, 1989) is OVERRULED. Plaintiffs' [sic] Motion for Relief From Judgement [sic] (filed June 29, 1989) is therefore DENIED.

[2] Aiding me greatly in conducting this review was the thorough Defendants' Memorandum in Opposition to Objections to the Magistrate's Recommended Findings of Fact and Memorandum of Decision (filed July 12, 1989).

2. Plaint s' [sic] Motion for a St of Judgement [sic] Re: F.R.Civ.P. Rule 74 et seq (filed June 22, 1989), Notice of Appeal to Di: ict Court Judge (filed Ju 22, 1989), Plaintiffs' [sic] Motion for a Copy of Transcript and Production of Transcripts Pursuant to F. R. Civ. P. rule 75(b)(2) (filed June 22, 1989) -- Plaintiff "appeals" the "decision" of Magistrate Eagan to the district judge, and moves for transcripts for his "appeal" and a stay of the judgment pending the "appeal." As noted above, however, Magistrate Eagan did not issue a decision in this case under 28 U.S.C. § 636(c), so no "appeal" can be taken to the district judge. Therefore this "appeal" must be DISMISSED and the motions DENIED. The judgment in this case was entered upon my order, and any appeal from that judgment must be taken to the Court of Appeals.

3. Motion for Order (filed July 12, 1989) -- Defendants seek an order (under 28 U.S.C. § 636(c)(5)[3], 28 U.S.C. § 1915(a), and 28 U.S.C. § 753(f)) certifying that any appeal in this case is frivolous, not taken in good faith, and lacking in probable cause. This motion is DENIED. Because of the unique procedural posture of this case I cannot say that an appeal to the Court of Appeals would not be taken in good faith within the meaning of § 1915(a).

[3]The motion cites "28 U.S.C § 636(4)(5)," but since no such subsection exists I assume defendants mean § 636(c)(5).

4. Plaintiffs' [sic] Motion for the Court Reporter to Prepare the Transcripts of this Case for the Purpose of Appeal (filed August 15, 1989) -- Plaintiff moves for an order directing the court reporter to prepare the entire transcript of the trial proceedings and deliver one copy to the Court Clerk and one copy to the plaintiff. Presumably plaintiff is requesting that the United States pay the fees for preparing these transcripts, pursuant to 28 U.S.C. § 753(f). This motion must be DENIED, as I cannot certify that "the appeal is not frivolous (but presents a substantial question)" within the meaning of § 753(f).[4] In addition I note that the record of this case as it now stands is ample to present to the Court of Appeals any issues regarding the procedural posture of this case, the only issues from which an appeal could be taken in good faith within the meaning of 28 U.S.C. § 1915(a).

5. Plaintiff/Appellants [sic] Motion to Proceed on Appeal In Forma Pauperis (filed August 15, 1989) -- Plaintiff moves for an order, pursuant to Fed. R. App. P. 24(a), for leave to proceed on appeal in forma pauperis. Because plaintiff makes an adequate showing of poverty, that motion is GRANTED.

[4]Although I have denied defendants' motion to certify that an appeal would not be taken in good faith within the meaning of 28 U.S.C. § 1915(a), I am not willing to certify that an appeal presents a substantial question for review within the meaning of 28 U.S.C. § 753(f). I am not certifying anything at all regarding this appeal.

CONCLUSION

To summarize: Plaintiffs [sic] Objection to the Magistrates' Recomended [sic] Findings and Memorandum of Decision Dated May 23/1989 (F. Owen Eagan) (filed June 22, 1989) is OVERRULED. Plaintiffs' [sic] Motion for Relief From Judgement [sic] (filed June 29, 1989) is DENIED. The Notice of Appeal to District Court Judge (filed June 22, 1989) is DISMISSED. Plaintiffs'[sic] Motion for a Stay of Judgement [sic] Re: F.R.Civ.P. Rule 74 et seq (filed June 22, 1989) is DENIED. Plaintiffs' [sic] Motion for a Copy of Transcript and Production of Transcripts Pursuant to F. R. Civ. P. rule 75(b)(2) (filed June 22, 1989) is DENIED. The Motion for Order (filed July 12, 1989) is DENIED. Plaintiffs' [sic] Motion for the Court Reporter to Prepare the Transcripts of this Case for the Purpose of Appeal (filed August 15, 1989) is DENIED. Plaintiff/Appellants [sic] Motion to Proceed on Appeal In Forma Pauperis (filed August 15, 1989) is GRANTED.

It is so ordered.

Dated at New Haven, Connecticut, this 17th day of August 1989.

José A. Cabranes
United States District Judge

APPENDIX 9

AO 440 (Rev. 10/93) SUMMONS IN A CIVIL ACTION

United States District Court	DISTRICT CONNECTICUT
JOHN J. McCARTHY	DOCKET NO. H-83-276 (JAC)
v.	TO: (NAME AND ADDRESS OF DEFENDANT) Lieutenant Steve Tozier CCI-Somers Bilton Road Somers, Conn. 06071 In his Official capacity
CARL ROBINSON, Et Al.	

YOU ARE HEREBY SUMMONED and required to serve upon

PLAINTIFF'S ATTORNEY (NAME AND ADDRESS)

John J. McCarthy (pro se)
Post Office Box 100
Somers, Connecticut 06071

RECEIVED
JUL 15 1965
ATTORNEY GENERAL'S OFFICE
HTFD.

an answer to the complaint which is herewith served upon you, within twenty (20) days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

A True Copy
ATTEST
KEVIN F. ROWE
Clerk
By

CLERK	DATE
KEVIN F. ROWE	7/2/65
(BY) DEPUTY CLERK	

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

JOHN J. McCARTHY,
Plaintiff,
-v-
CARL ROBINSON, Warden (deceased), Connecticut Correctional Institution, Somers; GEORGE BRONSON, Warden, Connecticut Correctional Institution, Somers; JOHN MANSON, Commissioner (deceased) of Corrections; STEVE TOZIER, Luitenant, Connecticut Correctional Institution, Somers; and Correctional Officers MICKIEWICZ, LUSA, JORGE, TEXEIRA, FALK, FLOWERS and BOND; in their individual and official capacities,
Defendants.

C.A. No. H-83-276 (JAC)

SECOND AMENDED (CIVIL RIGHTS) COMPLAINT WITH A JURY DEMAND

This is a § 1983 action filed by John J. McCarthy, a state prisoner, on April 11, 1983 alleging violation of his constitutional rights and seeking money damages, declatory judgment, and injunctive relief. The plaintiff requests a trial by jury.

I. Jurisdiction

1. This is a civil rights action under 42 U.S.C. § 1983 to redress the deprivation, under color of state law, of rights secured by the Constitution of the United States. The court has jurisdiction under 28 U.S.C. § 1343. Plaintiff seeks declaratory relief pursuant to 28 U.S.C. §§ 2201 and 2202 as well as injunctive relief. Plaintiff also invokes the pendent jurisdiction of this Court.

II. Parties

a. Plaintiffs

2. Plaintiff John J. McCarthy is and was at all times mentioned herein a prisoner of the state of Connecticut in the custody of the Connecticut Department of Corrections confined at the Connecticut Correctional Institution at Somers, Connecticut (hereinafter called "CCI-Somers" for purposes of this Complaint).

b. Defendants

3. Defendant Carl Robinson was the Warden of CCI-Somers until his death on December 18, 1983. Defendant Carl Robinson was legally responsible for the daily operation of CCI-Somers prior to December 18, 1983 and, specifically, on July 13, 1982 and for the welfare of all the inmates then confined in that prison.

4. Defendant George Bronson is the present Warden of CCI-Somers. He replaced the above-named defendant shortly after that defendant's death (first as "Acting Warden" then as Warden) on December 18, 1983). Defendant Bronson is lagally responsible for the daily operation of CCI-Somers and for the welfare of all the inmates of that prison. On or about July 13, 1982, Defendant George Bronson served as the Assistant Warden of Operations at CCI-Somers.

5. Defendant John Manson was the Commissioner of the Department of Corrections of the State of Connecticut until his death on September 17, 1983. He was legally responsible for the overall operation of the Department on or about July 13, 1982 and for the operation of each institution under its jurisdiction including CCI-Somers.

6. Defendant Steve Tozier is a Correctional Lieutenant at CCI-Somers and, as regards this complaint, was the Supervisor of Cell Block F on July 13, 1982 and the supervisor of the below-next named defendants.

7. Defendants Mickiewicz, Lusa, Jorge, Texiera, Falk, Flowers and Bond are each Correctional Officers of the Department of Corrections, who, at all times mentioned in this complaint, were assigned to CCI-Somers.

8. Each defendant is sued individually and in his official capacity. At all times mentioned in this complaint each defendant acted under color of Connecticut law.

III. Facts

9. The original complaint in this case was filed on April 11, 1983.

10. On July 13, 1982 at approximatly 1:45 P.M., plaintiff was ordered by defendant Mickiewicz to move from his cell (F-36) located in the area of CCI-Somers known as F-Block to another cell located in F-Block (F-85).

11. Plaintiff requested that he be given an explanation of the reason for said move from a supervising officer.

12. No explanation of the reason for said move was provided to plaintiff.

13. Plaintiff refused to move.

14. Defendant Lieutenant Tozier, acting as supervisor of F-Block, authorized the use of force including the use of a chemical weapon to remove plaintiff from his cell (F-36).

15. Plaintiff was forceably removed from his cell by defendants Lusa, Jorge, Texeira, Falk, Flowers and Bond with the use of a chemical weapon.

16. The chemical weapon used to remove plaintiff from his cell was a Tear Gas Duster commonly referred to by correctional sadists as "Big Red."

17. At the time plaintiff was forceably removed from his cell, Administrative Directives of the Department (of Corrections) did not contain a written standard for the use of force.

18. On July 13, 1982 at approximately 2:30 P.M., defendant Tozier ordered defendant Lusa to "gas" the plaintiff.

19. During the course of the forceable removal of the plaintiff from his cell and the giving of the above-said order, defendant Tozier was not line-of-sight of the incident.

20. At the conclusion of 'gassing' the plaintiff, defendants Lusa, Jorge, Texeira, Falk, Flowers and Bond handcuffed the plaintiff and removed him from his cell to another isolation cell.

21. During the course of the afore-mentioned incident, the plaintiff did not resist defendants Lusa, Jorge, Texeira, Falk Flowers and/or Bond, nor did plaintiff threaten any of those defendants with bodily harm.

22. On information and belief, defendant Mickelwicz had conspired with other prisoners involved in racial riots in F-Block to move me from F-36 to F-85, where those riots were occurring, in order to involve me in those riots.

23. According to the F-Block Log Book, plaintiff was removed from his cell at 2:30 P.M. by defendants Lusa, Jorge, Texeira, Falk, Flowers, and Bond.

24. The Tear Gas Duster mentioned, supra, is a more powerful weapon than mace.

25. The Incident Report signed by defendant Tozier indicates by check-off that "force", "mace", and "restraints" were used in the afore-mentioned forceable removal of plaintiff from his cell.

26. Defendant Tozier stated to the Correctional Ombudsperson that he authorized the use of the Tear Gas Duster because: a) he did not have confidence that mace would be effective; and b) he wanted something faster and stronger.

27. There is no standard reporting form for any chemical weapon other than mace used at CCI-Somers.

28. On July 13, 1982 there was no standard reporting form for any chemical weapon other than mace used at CCI-Somers.

29. On information and belief obtained from Training Officer Fields and Standards Compliance Supervisor Mary Anne Connors of the Department (of Corrections):

a) The tear gas duster is considerably more powerful and faster acting than mace.

b) The duster is particularly effective for situations where there is a physical barrier between the inmate and the officers which would preclude the use of mace (which requires direct contact to be effective); the duster can also be sprayed at a distance and the gaseous cloud that results can "roll" forward and still have an incapacitative effect.

c) The tear gas duster is a more dangerous weapon than mace because of its greater potential to cause burning; to prevent or reduce burning, the area of exposure must be promptly flushed with water.

d) The duster is not supposed to be fired within four feet of the subject nor is it supposed to be aimed at the eyes or head (in contrast to the instructions for mace which specifically call for aiming the weapon between the chin and upper chest area of the subject at close range).

e) The particular model weapon used in this case had proved to be especially dangerous due to an excessively high concentration of the irritant chemical, for which reason the manufacturer had recommended discontinuing its use.

30. There were no written directives governing the use of chemical weapons other than mace at the time this incident occurred.

31. The Directives for use of mace state in relevant part: "It has an approximate range of 15 to 20 feet . . . Being a weapon, final decisions in the firing of this weapon must be made by the Shift Supervisor on duty at the institution at the time."

32. Written policy and procedure of the Department of Corrections and the Institution did not provide for the use of the tear gas duster.

33. Mace was the chemical weapon of choice for the Department of Corrections in a situation involving a single inmate.

34. There was no evidence that the plaintiff was immune to the effects of mace.

35. Plaintiff was confined in his cell, alone, and there were no visual obstructions or significant physical barriers.

36. Plaintiff was not afforded a shower until at least two and one-half hours after the incident.

37. A rinse was especially important in this incident because the weapon had been fired directly at the plaintiff.

38. Plaintiff did not recieve medical attention until approximately seven hours after the incident and no Medical Incident Report accompanied the Incident Reports of July 13, 1982. The medical records at the CCI-Somers Hospital indicate that Dr. Johnson saw the plaintiff on July 15, 1982. Dr. Johnson observed chemical burns on plaintiff's arm, under his arm, and in his scalp. Plaintiff was treated at that time with an ointment.

39. Post-incident treatment of the plaintiff was inadequate.

40. The gas duster was not properly deployed.

41. The reports of the incident are deficient in that:

a. A Use of Mace Report was filed and "mace" was checked off on the Incident Report, creating an inaccurate and misleading record. It was not evident from the record that tear gas had been used.

b. It is not evident from the Incident Report that defendant Tozier was not at the immediate site of the incident. It is not evident that he did not give the order to fire the weapon. The reports did not state where the supervis-

sor was at the time the gas was dispersed, who gave the order to discharge the weapon, at what range the weapon was discharged, and where it was aimed. Such information is critical in determining whether a chemical weapon was properly deployed.

c. A Medical Incident Report was not filed with the Incident Report. Such a report is required by Administrative Directive 2.3 on reporting of incidents involving use of force.

42. At the time of the incident, neither the Administrative Directives nor the CCI-Somers Operational Directives contained a use of force doctrine. Neither addressed the use of the tear gas duster or other chemical weapons, except mace.

43. Plaintiff suffered extensive injuries to his body, some of which are permanent, as a result of the use of the tear gas duster.

44. On July 14, 1982 at 8:15 A.M. Correctional Officer issued plaintiff a disciplinary report signed by defendant Mickiewicz charging plaintiff with "Disobeying a direct order" based on plaintiff's refusal to move from his cell.

45. After plaintiff was forceably removed from cell F-36, another inmate was placed in that cell along with plaintiff's personal effects.

46. Another prisoner was confined in cell F-36 along with plaintiff's personal property from approximately 3:00 P.M. until approximately 9:00 P.M. on July 13, 1982.

47. After another prisoner was removed from plaintiff's cell, Correctional Officers Higgins and Dudek purportedly searched plaintiff's cell and found a 10" long shank (home-fashioned knife).

48. The shank referred to above was found among the plaintiff's personal effects.

49. The shank referred to in paragraphs 47 and 48, supra, was not found in the vicinity of plaintiff's bed in cell F-36.

50. On July 13, 1982 at 10:45 P.M., plaintiff's cell (F-36) was searched and Correctional Officer Higgins reported finding the shank described in paragraph 47, supra, among plaintiff's personal property.

51. On July 13, 1982 at 11:30 P.M., plaintiff was issued a disciplinary report signed by Correctional Officer Higgins

charging plaintiff with possession of "Contraband" based on the afore-mentioned finding of a shank in cell F-36.

52. On July 16, 1982, a hearing was held concerning the disciplinary report described paragraph 44, supra, at which plaintiff plead not guilty to the charge of disobeying a direct order.

53. At the conclusion of the above-mentioned hearing, plaintiff was found guilty and punishments were imposed upon plaintiff including indefinite confinement to punitive segregation and recommended loss of sixty days good conduct time.

54. On July 16, 1982, a hearing was held concerning the disciplinary report described in paragraphs 47 and 48, supra, at which plaintiff plead not guilty to the charge of possession of contraband "class A".

55. At the conclusion of the above-mentioned hearing, plaintiff was found guilty and punishments were imposed upon plaintiff including idefinite confinement to punitive segregation and recommended loss of sixty days good conduct time.

56. On August 1, 1982, plaintiff was notified by defendant Manson that sixty days of good conduct time had been forfeited as a result of the disciplinary hearing mentioned in paragraphs 52 through 55, above.

57. (reserved for future amendments)

58. (reserved for future amendments)

59. (reserved for future amendments)

60. (reserved for future amendments)

IV. Legal Claims

a. First Cause of Action

61. The actions of the defendants stated in paragraphs 9 through 60 denied plaintiff due process of law in violation of the Fourteenth Amendment to the United States Constitution.

62. Plaintiff's Fourteenth Amendment right to be free of unjustified and excessive use of force was violated when
a) he was tear gassed and
b) forceably removed from his cell.

63. Plaintiff's Fourteenth Amendment right not to be deprived of his liberty interest was violated when he was deprived of his statutorily created good conduct time.

b. Second Cause of Action

64. The actions of the defendants stated in paragraphs 9 through 43 violated state law.

65. Plaintiff alleges that defendants violated state law of assault and battery and the regulations of the Connecticut Department of Corrections with respect to the lawful use of force when plaintiff was sprayed with tear gas while in his cell.

c. Third Cause of Action

66. The actions of the defendant stated in paragraphs 9 through 45 denied plaintiff of his right to freedom from cruel, unusual and corporeal punishments in violation of the Eighth Amendment to the United States Constitution and subjected the plaintiff to punishments imposed without due process of law in violation of the Fourteenth Amendment to the United States Constitution.

67. Plaintiff's Eighth and Fourteenth Amendment rights to be free from cruel and unusual punishments imposed without due process of law were violated when
a) he was tear gassed and
b) forceably removed from his cell.

V. Relief

WHEREFORE, plaintiff requests this Honorable Court grant the following relief:

A. Issue a declatory judgment that defendants violated the United States Constitution and state law when they:
1) used the tear gas duster on plaintiff without justification;
2) forceably removed plaintiff from cell F-36 and
3) deprived plaintiff of his statutorily-based lib-

erty (good time) interest.

B. Issue an injunction ordering that defendants or their agents:
1) refrain from using tear gas against plaintiff, except when immediately necessary to prevent injury, death, or the destruction of valuable property;
2) immediately formulate and adopt rigid Directives restricting the use of Tear Gas and the weapon known as the Tear Gas Duster to riot situations involving multiple inmates or to situations where there exist barriers obstructing the use of mace.
3) immediately formulate and adopt rigid Directives requiring the immediate post-incident treatment of inmates sprayed with tear gas including adequate medical treatment and shower facilities.

C. Grant compensatory damages in the following amount:
1) $100,000 against defendants Robinson and Bronson;
2) $100,000 against defendant Manson;
3) $10,000 against defendants Tozier and Lusa and from each of them;
4) $10,000 against defendant Mickiewicz; and
5) $5,000 against defendants Jorge, Texeira, Falk Flowers and Bond, and from each of them.

D. Grant punitive damages of $100,000 against each of the the defendants.

E. A jury trial on all issues triable by jury.

F. Plaintiff's costs of this suit including, but not limited to, attorney's fees (if any).

G. Such other and further relief as this court deems just, proper and equitable.

Dated: April 19, 1985 at Somers, Connecticut.

Respectfully submitted,

John J. McCarthy
Post Office Box 100
Somers, Conn. 06071

In Propria Personam

JHLI/rjd

V E R I F I C A T I O N

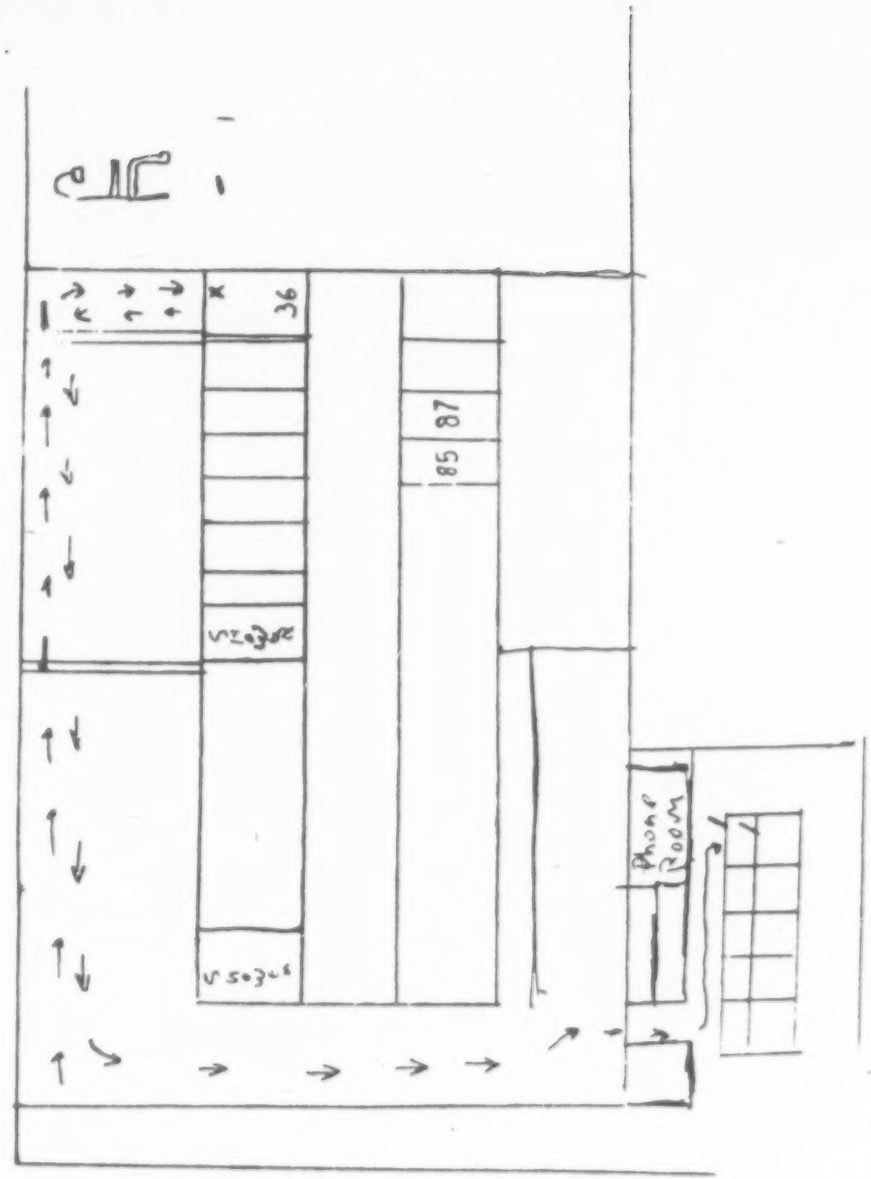
I have read the foregoing Second Amended (Civil Rights) Complaint With A Jury Demand and hereby verify that the matters alleged therein are true, except as to matters alleged on information and belief, and, as to those, I believe them to be true. I certify under penalty of perjury that the foregoing is true and correct.

Executed at Somers, Connecticut on April 19, 1965.

John McCarthy

John J. McCarthy

(7)



JUL 19 1982

CIDENT REPORT

Facility: CCI/CCC C.I. Somers

Location: C.C.I.S. Seg. Unit F-Blk. Date & Time: 7 / 13 / 82 3:15 AM (PM) (circle

INMATE(S) NAME (print)	ID #	AGE	COMMENTS/STATUS
McCarthy. John	14163		

STAFF NAME(S) (print)	Title	NAME	Title
Mickiewicz. F.	C/O		
Lusa. P.	C/O		
Jorge. C.	C/O		

TEXT ~~Inmate McCarthy. 14163~~ was given numerous orders to by C/O Mickiewicz to move to another cell in F-Blk. Subject refused to comply with this order and stated to officers that you can come and get me. Inmate McCarthy had tied his cell door in two different spots to prevent its opening. As we opened his door he made a sudden lunge towards his bed. At this point the order was given to disperse the duster. Subject was then handcuffed and escorted to the isolation area. (cont)

Signed J. Mackiewicz (1st Sat) Title C/O Date 7 / 14 / 82 Time 10:00 (AM) PM

ACTION/DISPOSITION (Check as applicable)

Use of Force _____ Mace X Restraints Handcuffs date/time removed 3:30 PM

DR X Assigned to: _____ ISOL X SEG _____ HOSP _____ 15 min. watch _____

Contraband disposition: _____

Injuries: Name	(check) Staff	Inmate	TYPE	Where Treated

Property damage to: _____ repairs requested _____ completed _____

CONTACTS: Warden/Supt/Duty Off. _____ date/time _____

OUTSIDE AGENCY _____ Dept _____ date/time _____

(police/fire) _____ Dept _____ date/time _____

Central Office _____ date/time _____

_____ date/time _____

OTHER ATTACHED REPORTS: Med Inct _____ UOF Suppl _____ Mace ✓ Other _____

If State Police Investigation, CASE # _____

If a staff member was assaulted during this incident, does she/he request criminal prosecution?

No _____ Yes _____ Signed _____

COMMENTS/RECOMMENDATIONS: _____

Review: Shift Supervisor _____ Date 7/15/82

Warden/Superintendent _____ Date 7/16/82

CN6080 REV 1/82

CIDENT REPORT McCarthy 14163 PAGE 2 of 2

Facility: CCI/CCC C.C.I. Somers Incident date 7 / 13 / 1982

Time 3:15 AM (PM)

TEXT (continued): Upon shaking down Mc Carthy's cell after this incident a "shank" approximately ten inches in length was found there.

Signed L.A. Tyni Title FF date 7/13/82

time 9:00 (AM) PM

STATE OF CONNECTICUT
DEPARTMENT OF CORRECTION

USE—OF—FORCE SUPPLEMENTARY REPORT

This form to be submitted with COR 38 (Use of Force Report) only when more than one staff member is involved in a use of force or assault incident.

I. IDENTIFICATION

C.C.I. Somers | McCarthy, John | 14163
Institution | Inmate Name: Last First Middle Inital | Inmate No.

II. OFFICER'S REPORT

A. Circumstances leading to Use of Force or Assault by Inmate:

TIME MONTH DAY YEAR OF INCIDENT

3:15 PM 7/13/82

I was assisting other officers to move McCarthy. 14163 who had been ordered to move from F-36 to F-85. McCarthy had his cell door tied up to prevent opening it. He was ordered three times and still refused to move. He held his hand behind him hiding what I thought to be a weapon. I was ordered to "gas" Mc Carthy as we opened his door and he was moving toward ~~xxxxxxx~~ his bed. He was then handcuffed and moved to another cell.

B. Type and Extent of Forceful Action: Include Equipment Employed, if any:

A three second burst of gas.

I held his left hand behind him while he was being handcuffed.

C. Complete (only when appropriate) by staff member if assaulted by inmate.
Do you feel that inmate(s) should be considered for criminal prosecution?
☐ Yes ☐ No

D. Lusa, Paul | C/O | Paul Lusa
NAME | TITLE | SIGNATURE

COR 49
Revised 10/70
Local Reprod. Auth.

CCI-SOMERS

USE OF MACE REPORT FORM

In accordance with Administrative Directive 2.2, the following information will be recorded and a copy attached to the appropriate Incident Report.

DATE July 13, 1982 TIME 3:20 (am) (pm)

AUTHORIZED BY: Lt Steven A. Tolier (Supervisor)
(please print)

FIRED BY: Correctional Officer P Lusa
(please print)

INMATE(S) WEAPON USED ON: McCarthy, John Number # 14163

APPROXIAMATE DOSAGE SPENT: 3 Second Burst

COMMENTS: Subject was given numerous direct orders to move out of his cell, he refused, as the officers started to enter his cell Inmate McCarthy lunged towards his Pillow, thinking he was going after a weapon it was at this point that the chemical agent was dispersed.

NOTE: After Inmate McCarthy was removed from his cell, the cell was shaken down and a shank approximatly 10" long with a blade approximatly 6" long was found in his cell.

SUPERVISOR'S SIGNATURE Steven A. Tolier Date 7/13/82

State of Connecticut

DIVISION OF PUBLIC DEFENDER SERVICES

OFFICE OF PUBLIC DEFENDER
121 ELM STREET
NEW HAVEN, CONNECTICUT 06507
789-7477 789-7479

July 23, 1982

Mr. John McCarthy
P.O. Box 100
Somers, CT 06071

Dear Mr. McCarthy:

After speaking to you on Wednesday, I spoke to Douglas Nash, the habeas corpus attorney in our office. Mr. Nash advised me that the best way for you to proceed in your new habeas corpus action (concerning the voluntariness of your guilty plea) is to fill out and file one of the state habeas corpus petition forms that are available at the prison. You can simply check the appropriate item in paragraph 5 as to the grounds for your petition. Once that is filed, it will be referred to Attorney Nash, and he will then meet with you to discuss the case.

As far as having photographs taken of your injury, I have been in touch with Alex Cybulski, an Assistant Warden at the prison. He advised me today that pictures will be taken as soon as possible, but that the photos will be kept in your central file until needed for any subsequent proceedings. If there should prove to be any undue delay in this matter, feel free to contact me.

Very truly yours,

Richard Emanuel

Richard Emanuel
Assistant Public Defender

RE/gh

CN6200
REV 2/80
Local Repro Auth
Page 1 & 2 of 3 Pages

CONNECTICUT DEPARTMENT OF CORRECTION
DISCIPLINARY REPORT

Choice of Advocate
1. None
2.
3.
4.
Declines Advocate ☐

I. IDENTIFICATION OF INMATE

C.C.I. Somers — McCarthy, John — 14163 F-43
Corr. Facility — Last Name — First — Middle I. — Inmate Number

II. OFFICER'S REPORT

A. CHARGE(S): Disobeying a direct order — 3:15 PM — 7/13/82
(See Codification on Back of Page) — Time — Month Day Year of Offense

B. REPORTING OFFICER(S):

Signature Dickiewicz, F. — Title C/O — Time 8:15 AM — Month Day Year of Report 7/14/82

C. DELIVERY OF CHARGE(S): I hereby cerifty that at 3:45 pm on this 14th day of July 1982 I have served notice on this inmate that he will be given a hearing on this charge before the Disciplinary Committee on 16 7 82 and I have given him a copy of the charge.
Da. Mo. Yr.
Signature Richard Kobylarz Jr. Title C/O

D. OFFICER'S STATEMENT OF CHARGE(S): (Describe circumstances of offense giving elements of charge, disposition of physical evidence, if any, unusual inmate behavior, and staff or inmate witnesses.)

Inmate McCarthy, 14163 was given a direct order to move from F-36 to F-85. Inmate McCarthy refused to obey my order. He said, " I am not going anywhere, if you want me, come in and get me." Other officers were called from the Hall and McCarthy was moved to F-43.

III. INVESTIGATION

A. REPORT OF INVESTIGATOR: (Include names of staff and/or inmate witnesses if available and as required.)

The accused readily admits the allegations. He indicated that he was angry because of an earlier incident and as a result, responded in an inappropriate manner.

B. INVESTIGATOR

Signature J Tupas Title Capt. — Month July Day 15 Year of Investigation 1982

IV. INMATE DATA

2-26-81 — 20 — Adm/Seg — 3-10-86 — 27 — F-43
Month Day & Year of Admission — Prior Reports — Work Detail — Min. Exp. Date — Age — Living Quarters

V. DISPOSITION OF CHARGES BY DISCIPLINARY COMMITTEE:

A. Not Guilty — Guilty — 7-16-82
Plea — Finding — Month Day Year of Action

B. Disciplinary Action Punitive Seg Indef.

C. Good Time Loss Recommended 60 Days L.G.T.

D. Disciplinary Committee Members: Mr. Rubba — C/O Felix
Recorder T/O D'Andrea
Chairman — Signature

VI. WARDEN'S REVIEW — Signature — Date 7/20/82

VII. COMMISSIONER'S APPROVAL — Signature — Date 60

Distribution: Page 1 to Institutional Record — Page 2 to Central Office — Page to Inmate

172

CN6200
REV 2/80
Local Repro Auth
Page 1 & 2 of 3 Pages

CONNECTICUT DEPARTMENT OF CORRECTION
DISCIPLINARY REPORT

Choice of Advocate
1. [illegible]
2.
3.
4.
Declines Advocate ☐

I. IDENTIFICATION OF INMATE

CCIS — MCCARTHY — JOHN — Middle I. — 14163 Inmate Number
Corr. Facility — Last Name — First

II. OFFICER'S REPORT

A. CHARGE(S): [redacted] CONTRABAND / 1045PM JULY 13 1982
(See Codification on Back of Page) — Time — Month Day Year of Offense

B. REPORTING OFFICER(S):

HIGGINS — Signature — Title — Time 1045PM — Month JULY — Day 13 — Year of Report 1982

C. DELIVERY OF CHARGE(S): I hereby cerifty that at [illegible] on this 14 day of July 19 82 I have served notice on this inmate that he will be given a hearing on this charge before the Disciplinary Committee on [illegible] and I have given him a copy of the charge.
Da. Mo. Yr.
Signature C/O Tremblay Title C/O

D. OFFICER'S STATEMENT OF CHARGE(S): (Describe circumstances of offense giving elements of charge, disposition of physical evidence, if any, unusual inmate behavior, and staff or inmate witnesses.)

WHILE CONDUCTING A SHAKE DOWN OF F 36, C/O'S DUDEK AND HIGGINS FOUND AN APPROX. 10INS. SHANK WITH A BLADE OF APPROX. 6 INS. IN THE PROPERTY OF INMATE MCCARTHY

III. INVESTIGATION

A. REPORT OF INVESTIGATOR: (Include names of staff and/or inmate witnesses if available and as required.)

The [illegible] was taken to this writers cell - #36 - by C/O Dudek - Higgins from the floor of the cell and the other inmates were removed. This cell is in his area.

B. INVESTIGATOR

Signature [illegible] Title Lt. — Month 7 Day 14 Year of Investigation 1982

IV. INMATE DATA

2-26-81 — 21 — Adm/Seg — 3-10-86 — 27 — F-43
Month Day & Year of Admission — Prior Reports — Work Detail — Min. Exp. Date — Age — Living Quarters

V. DISPOSITION OF CHARGES BY DISCIPLINARY COMMITTEE:

A. Not Guilty — Guilty — 7-16-82
Plea — Finding — Month Day Year of Action

B. Disciplinary Action Concurrent to Report dated 7-13-82 3:15 P.M.

C. Good Time Loss Recommended: Same as Above -

D. Disciplinary Committee Members: Mr. Rubba — C/O Felix
Recorder T/O D'Andrea
Chairman — Signature

VI. WARDEN'S REVIEW — Signature — Date 7/20/82

VII. COMMISSIONER'S APPROVAL — Signature — Date

Distribution: Page 1 to Institutional Record — Page 2 to Central Office — Page to Inmate

D. CIPLINARY HEARING SUMMAR

cility C.C.I. Somers Date 7-16-82

cused McCarthy, John # 14163

e (s) of Disciplinary Report (s) 7-13-82

arges 1.) disobeying a direct order (see #30)

fense Classification (s) B Advocate declined

tnesses declined

mmittee Members Cpt Rooney (chairman); Mr. Rubin; Jo. Felix

ea 1.) not guilty Finding guilty

sposition pun seg 7 days; recommend a loss of 60 days m&t

MMENTS

: Evidence on which finding was based subject was found guilty based upon the officers misconduct report

: Reasons for disposition The above disposition was deemed appropriate in light of subject's refusal to cooperate with an Administrative Procedure (all charges) which presents a serious breach of security in segregation area

corder's signature Frederick Dedden Jr CMO

te: Inmates may appeal Disciplinary Committee actions by writing to the head of the institution within 15 days of the findings, stating why the disposition should be changed.

py given to inmate _____ By _____
Date Time Staff Member delivering report

JUL 23 1982

Warden

D. CIPLINARY HEARING SUMMAR

cility C.C.I. Somers Date 7-16-82

cused McCarthy, John # 14163

e (s) of Disciplinary Report (s) 7-13-82

arges 1.) Continued "Class A" (see #15)

fense Classification (s) A. Advocate declined Mr. Pia

tnesses declined

mmittee Members Cpt Rooney (chairman); Mr. Rubin; Jo Felix

ea 1.) not guilty Finding Guilty

sposition pun seg 7 days, recommend loss of 60 days m&t

MMENTS

: Evidence on which finding was based subject was found guilty based upon the officers misconduct report and on physical evidence (shank) confiscated upon a shakedown

: Reasons for disposition The above disposition was deemed appropriate in light of subject presenting a serious breach of security by his possession of Contraband (homemade shank).

corder's signature Frederick Dedden Jr CMO

te: Inmates may appeal Disciplinary Committee actions by writing to the head of the institution within 15 days of the findings, stating why the disposition should be changed.

py given to inmate _____ By _____
Date Time Staff Member delivering report

STATE OF CONNECTICUT
EPARTMENT OF CORREC ON
340 CAPITOL AVENUE • HARTFORD, CONNECTICUT 06106

WILLIAM A. O'NEILL
GOVERNOR

JOHN R. MANSON
COMMISSIONER

NOTIFICATION OF GOOD TIME FORFEITURE

Date: 8/1/82

TO: John McCarthy #14163, CCI, Somers

RE: Institutional Disciplinary Committee Hearing of 7/16/82

No. of Days to be Forfeited and/or Amount of Fine* : 60 days

The above action has taken into consideration your written statement concerning the charges (or your option to refrain from making such a plea on your own behalf) within 15 days of disposition of the disciplinary committee.

In the absence of further disciplinary committee action and with exemplary conduct, you may apply through the institution for restoration of the good time forfeited after the passage of 9 months.

John R. Manson
Commissioner

cc: Warden/Superintendent

*NOTE: All fines are payable within 30 days of receipt of this notification.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

JOHN J. McCARTHY	)	
	)	
-v-	)	Civil Action No. H-83-278 (JAC .
	)	
CARL ROBINSON, Et Al.	)	(Civil Rights)

PROOF OF SERVICE

John J. McCarthy states under the penalty of perjury that he mailed a copy of the Motion For Leave to File A Second Amended Complaint and the Summonses and a copy of the Second Amended (Civil Rights) Complaint With a Jury Demand to counsel for those defendants who are already parties to this action (Carl Robinson and George Bronson) Patricia M. Strong, Assistant Attorney General, 340 Capitol Avenue, Hartford, Connecticut 06106, by placing them in an envelope and placed them in the "H-Block" mailbox at the Connecticut Correctional Institution, Somers, on April 19, 1985.

P L A I N T I F F
John J. McCarthy

John J. McCarthy, pro se
Post Office Box 100
Somers, Connecticut 06071

Service certified pursuant to Rule 5(b), F.R.C.P. this 20th day of April, 1985.

John J. McCarthy, pro se

APPENDIX 10

MORNING SESSION

10:00 O'CLOCK A.M.

THE COURT: Good morning, ladies and gentlemen.

This morning, ladies and gentlemen, we are here on Civil No. H-83-278 (JAC). This is McCarthy vs. Carl Robinson, and the purpose of our meeting this morning is to try this matter to its conclusion.

Now, before we get started, there are a few housekeeping matters we should take up. The first is the consent to proceed before the United States Magistrate, and it has been signed by the State, but let me explain to Mr. McCarthy what that is and then he has a choice of what he wishes to do.

On cases that are assigned from a District Court Judge to Magistrate for trial, they can be done in one of two ways: They can be tried before the Magistrate sitting as the District Court Judge with the permission of both the Plaintiffs and the Defendants, and then the Magistrate enters a final order which is then appealable usually to the District Court Judge or

to the Second Circuit, depending on how the form is printed and how the parties agree.

If that is not an acceptable way, then the trial continues as the Magistrate being a fact-finder, and the Magistrate makes a recommendation to the District Court Judge -- in this case it is Judge Cabranes -- and that's the procedure that we go through. So you have your choice at this time. It makes no difference to me. Whichever way you prefer. The State is willing to go with the Magistrate as the fact-finder, but you do not have to.

MR. McCARTHY: Okay. Then we will have to reschedule the trial; right?

THE COURT: No. We go forward either way. We go under the Magistrate being the final fact-finder or being the recommended fact-finder. Either way, we go forward.

MR. McCARTHY: I would rather have the District Court Judge hear the case.

THE COURT: All right.

MR. McCARTHY: Are we still going to hear the case?

THE COURT: We are still going to hear the case.

MR. McCARTHY: Okay.

I will just stipulate to that. I would rather have the District Court Judge hear the case.

THE COURT: All right.

Then there will be no consent. I will return to the consent form. The Court will take it and issue a recommended finding at the conclusion of the case.

MR. McCARTHY: Okay.

THE COURT: That doesn't mean you will get another trial before the District Court Judge. He has to review my findings and review my decision.

MR. McCARTHY: So I will appeal directly to him.

THE COURT: You can do that this way, too.

MR. McCARTHY: I will go like we are doing now. I would rather he heard it.

THE COURT: You are going to be heard either way.

MR. McCARTHY: I am just saying I want to make a point that I stipulate to that fact, that I don't consent.

THE COURT: You don't consent.

MR. McCARTHY: Right.

THE COURT: All right.

Then I will return this to the Clerk of the Court. Now, can you tell me, or -- let me tell you how we are going to proceed so both of you will understand.

We will proceed today until 4:00 o'clock. If there are still matters to be -- if it is not concluded by that time, we will again reconvene here, I believe it is next Thursday, and continue the case at that time. We are not going day to day. We have to go Thursday to Thursday.

I would like to have an idea from each side how many witnesses you have and approximately how long you think it will take. So I will start with the Plaintiff first.

Mr. McCarthy, how many witnesses do you have?

MR. McCARTHY: Okay.

I would like to call all the Defendants in this case and --

THE COURT: How many Defendants are there?

MR. McCARTHY: Didn't the Court make

APPENDIX 11

Cited in Clark v Poulton pp. 6166-68

LEGISLATIVE HISTORY
P.L. 94-577

UNITED STATES MAGISTRATES—JURISDICTION

P.L. 94-577, see page 90 Stat. 2729

Senate Report (Judiciary Committee) No. 94-625, Feb. 3, 1976 [To accompany S. 1283]

House Report (Judiciary Committee) No. 94-1609, Sept. 17, 1976 [To accompany S. 1283]

Cong. Record Vol. 122 (1976)

DATES OF CONSIDERATION AND PASSAGE

Senate February 5, October 1, 1976

House October 1, 1976

The House Report is set out.

HOUSE REPORT NO. 94-1609

[page 1]

The Committe on the Judiciary to whom was referred the bill (S. 1283) to improve judicial machinery by further defining the jurisdiction of United States magistrates, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

* * * * * * * * * *

[page 2]

PURPOSE OF THE BILL

The purpose of the bill is to amend section 636(b), title 28 United States Code, in order to clarify and further define the additional duties which may be assigned to a United States Magistrate in the discretion of a judge of the district court. These additional duties generally relate to the hearing of motions in both criminal and civil cases, including both preliminary procedural motions and certain dispositive motions. The bill provides for different procedures depending upon whether the proceeding involves a matter preliminary to trial or a motion which is

[page 3]

dispositive of the action. In either case the order or the recommendation of the magistrate is subject to final review by a judge of the court.

The purpose of the amendments to the Senate act are as follows:

(1) The first amendment clarifies the intent of Congress that all motions to dismiss, and therefore dispositive motions, will be subject to the procedures of subparagraphs (B) and (C). Therefore such motions, which may be heard by the magistrate, will be determined by the judge, and those portions of findings and recommendations to which objection is made will require a de novo determination by the judge. This conforms to the intent of the Senate and the Judicial Conference, as well.

CTION

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Judicial Con-

(2) The second amendment emphasizes and clarifies when a de novo determination must be made by the judge. The Committee believed that the S. 1283 was not clear with regard to the type of review afforded a party who takes exceptions to a magistrate's findings and recommendations in dispositive and posttrial matters. The amendment to subparagraph (b)(1)(C) is intended to clarify the intent of Congress with regard to the review of the magistrate's recommendations; it does not affect the substance of the bill. The amendment states expressly what the Senate implied; i.e. that the district judge in making the ultimate determination of the matter, would have to give fresh consideration to those issues to which specific objection has been made by a party.

The use of the words "de novo determination" is not intended to require the judge to actually conduct a new hearing on contested issues. Normally, the judge, on application, will consider the record which has been developed before the magistrate and make his own determination on the basis of that record, without being bound to adopt the findings and conclusions of the magistrate. In some specific instances, however, it may be necessary for the judge to modify or reject the findings of the magistrate, to take additional evidence, recall witnesses, or recommit the matter to the magistrate for further proceedings.

The approach of the Committee, as well as that of the Senate, is adopted from the decision of the United States Court of Appeals for the Ninth Circuit in *Campbell v. United States District Court for the Northern District of California*, 501 F.2d 196 (9th Cir.), cert. denied, 419 U.S. 879 (1974)[1] The clarifying amendment merely draws upon the language of the Campbell decision to a greater extent:

> In carryng out its duties the district court will conform to the following procedure: If neither party contests the magistrate's proposed findings of fact, the court may assume their correctness and decide the motion on the applicable law.
>
> The district court, on application, shall listen to the tape recording of the evidence and proceedings before the magistrate and consider the magistrate's proposed findings of fact and conclusions of law. The court shall make a *de novo* determination of the facts and the legal conclusions to be draw therefrom.
>
> The court may call for and receive additional evidence. If it finds there is a problem as to the credibility of a witness or witnesses or for other good reasons, it may, in the exercise of

1. 95 S.Ct. 143, 42 L.Ed.2d 119.

[page 4]

> its discretion, call and hear the testimony of a witness or witnesses in an adversary proceeding. It is not required to hear any witness and not required to hold a *de novo* hearing of the case.
>
> Finally, the court may accept, reject or modify, the proposed findings or may enter new findings. It shall make the final determination of the facts and the final adjudication. . . . (501 F. 2d at 206)

(3) The third amendment to S. 1283, which is section 2 of the act, as amended, makes changes in the *habeas corpus* rules of procedure.[1] Those rules were originally promulgated by the Supreme Court on April 26, 1976. The House recently approved legislation (H.R. 15319) making some changes in them and providing that they shall take effect on February 1, 1976.[2]

Rule 8(b), tracking the present Magistrates Act and case law, sets forth the authority of magistrates with respect to evidentiary hearings in postconviction cases and proceedings. Rule 8(b), as it presently will take effect, authorizes a district court, by local rule, to improve a magistrate to recommend whether or not an evidentiary hearing is necessary in order to dispose of a petition under 28 U.S.C. § 2254 or a petition under 28 U.S.C. § 2255.

This legislation expands the authority of magistrates beyond that set forth in Rule 8(b) of the habeas corpus rules of procedure. It is therefore necessary to change Rule 8(b) in order to make it consistent with the provisions of this legislation. Section 2 of the bill, therefore, inserts language into Rule 8(b) that will bring it into conformity with this legislation.

STATEMENT

When the Congress enacted the Magistrates Act in 1968 (P.L. 90-578), it created a system of full-time and part-time judicial officers who would perform various judicial duties under the supervision of the district courts in order to assist the judges of these courts in handling an ever-increasing caseload.

In the 93rd Congress, the Judiciary Subcommittee on Improvements in Judicial Machinery held 17 days of hearings, during which extensive inquiry was made into the caseload of federal district courts. During these hearings, the chief judges of 44 of the federal judicial districts personally appeared and testified before the subcommittee. The vast majority of the chief judges who testified stated that the magistrates were of assistance to the court in handling certain preliminary matters in both civil and criminal cases, and were of greatest assistance in handling petitions for the issuance of a writ of habeas corpus made by both state and federal prisoners in an effort to obtain a collateral review of the original conviction. A few of the district courts which had not made extensive use of the services of the magistrates were encouraged to do so as a means of freeing time of district court judges to preside at trials of other cases.

[1] Rule Governing Section 2254 Cases in the United States District Court and Rules Governing Section 2255 Proceedings for the United States District Courts.
[2] H.R. 15319 passed the House on September 14, 1976, by a vote of 339-4. *See* House Report No. 94-1471.

[page 5]

In several of the districts, the majority of the judges of the court authorized magistrates to hold evidentiary hearings in habeas corpus cases and to submit to a judge of the court recommended findings of fact and conclusions of law dispositive of the petition for a writ of habeas corpus. The recommendations of the magistrate would be reviewed by the judge who would then exercise the ultimate authority to issue an appropriate order.

However, on June 26, 1974, in the case of *Wingo* v. *Wedding*, 418 U.S. 461,[2] the Supreme Court of the United States interpreted Section

636(b) of Title 28 of the U.S. Code, as authorizing the magistrate to make merely a "preliminary review" of a prisoner petition and expressly held that the statutory language did not evidence any intent by Congress that the magistrate be authorized to hold an evidentiary hearing in a habeas corpus proceeding.

In a dissenting opinion, the Chief Justice and Justice White dissented on the basis that Section 636(b) "should be interpreted to permit magistrates to conduct evidentiary hearings in federal habeas corpus cases", since such an interpretation would serve the principle objectives of the Magistrates Act. The dissenting opinion concluded with the following statement:

> In any event, now that the Court has construed the Magistrates Act contrary to a clear legislative intent, it is for the Congress to act to restate its intentions if its declared objectives are to be carried out.

The bill under consideration by the committee would accomplish this restatement and clarification of the Congressional intention that the magistrate should be a judicial officer who, not only in his own right but also under general supervision of the court, shall serve as an officer of the court in disposing of minor and petty criminal offenses, in the preliminary or pretrial processing of both criminal and civil cases, and in hearing dispositive motions and evidentiary hearings when assigned to the magistrate by a judge of the court.

In addition to *Wingo* v. *Wedding* there are several other court decisions the result of which would be overcome by passage of this bill. In *T.P.O.* v. *McMillan* (7th Cir. 1972) 460 F.2d 348, the court held that a magistrate could not hear a motion to dismiss or a motion for summary judgment, even though an appeal was allowed from a final order of a magistrate to a judge of the district court. In *Ingram* v. *Richardson* (6th Cir. 1972) 471 F.2d 1268, the court held that a magistrate had no power to review the Secretary's denial of social security benefits and to make proposed findings of fact and conclusions of law which proposed order was then submitted to a district court judge for final decision. In *T.P.O.* v. *McMillon*, supra, the court stated:

> We need not speculate in regard to what civil functions the magistrate can constitutionally perform, however, since Congress carefully intended that in regard to civil cases the magistrate was not empowered to exercise ultimate adjudicatory or decision making.

2. 94 S.Ct. 2842, 41 L.Ed.2d 879.

[page 6]

Also, in *Wilver* v. *Fischer* (10th Cir. 1967) 387 F.2d 66, which predated the Magistrates Act, the court held that a master could not be appointed to supervise discovery proceedings in civil actions.

Since introduction of S. 1283, the Supreme Court of the United States granted certiorari in *Weber* v. *Secretary of HEW*, 503 F.2d 1049 (CA 9 1064), and on January 14, 1976, resolved the conflict between *Ingram* and *Matthews* concerning the power of a district court to assign, under section 636(b), to a magistrate an action to review

a final determination of the Secretary of Health, Education and Welfare on the question of whether a person was entitled to social security benefits. In *Matthews* v. *Weber* (January 14, 1976) 423 U.S. 261,[3] 44 LW 4065, the Supreme Court held that under section 636(b) it was competent for the court to assign as "additional duties" of the magistrate an action to review an award of Social Security benefits. The Supreme Court noted that the reference to the magistrate was "to prepare a proposed written order or decision, together with proposed findings of fact and conclusions of law where necessary or appropriate". Under subsection (b)(1)(B) of section 636 as amended by S. 1283, the magistrate could be given similar responsibilities with reference to certain dispositive motions, to applications for post-trial relief and to prisoner petitions brought under section 1983 of title 42 U.S. Code.

In 1968, when the Magistrates Act was passed, the total filings in the United States District Courts were 102,000 cases. In 1974, total filings amounted to 143,000 cases. In 1968, there were 323 district court judges. In 1974, there were 400 district court judges. The Congress in enacting the Magistrates Act manifested its intention to create a judicial officer and to invest in him the power to furnish assistance to a judge of the district court. The magistrate was given jurisdiction over petty criminal offenses and the Act also gave each district court the discretionary power to use the magistrate to assist a district court judge "in the conduct of pretrial or discovery proceedings in civil or criminal actions" and to make a "preliminary review of applications for posttrial relief" and to submit a report and recommendations "to facilitate the decision of the district judge having jurisdiction over the case as to whether there should be a hearing".

The language quoted above is from the 1968 Magistrates Act. In *T.P.O.* v. *McMillan*, the decision restricting the power of magistrates in pretrial proceedings hinged on the judicial interpretation of congressional intent. Similiarly, in *Wingo* v. *Wedding* the authority of the magistrate to hold an evidentiary hearing in a habeas corpus proceeding also hinged on an interpretation of congressional intent.

It seems to the committee that in 1968 the Congress clearly indicated its intent that the magistrate should be a judicial officer whose purpose was to assist the district judge to the end that the district judge could have more time to preside at the trial of cases having been relieved of part of his duties which required the judge to personally hear each and every pretrial motion or proceeding necessary to prepare a case for trial. That the magistrate has fulfilled this function seems clear from the statistics relating to magistrate activity in fiscal year 1976. In this year magistrates handled a volume of matters as shown in the following table:

3. 96 S.Ct. 549, 46 L.Ed.2d 483.

[page 7]

In fiscal year 1976 magistrates handled a volume of matters as shown in the following table:

Criminal cases:	
Minor offenses	11,692
Petty offenses	78,474
Arrest warrants	22,531
Search warrants	6,068
Bail hearings	48,616
Preliminary examinations	7,142
Removal hearings	1,727
Subtotal	176,250
Post indictment arraignments	18,694
Pretrial conferences	5,397
Pretrial motions	7,861
Probation revocation	726
Other criminal matters	2,918
Subtotal	35,596
Total criminal matters	211,846
Civil cases:	
Prisoner petitions	8,231
Pretrial conferences	17,559
Motions	9,583
Special master reports	684
Social security cases	1,480
Other civil matters	2,761
Total civil cases	40,298

Rather than constituting "an abdication of the judicial function", it seems to the committee that the use of a magistrate under the provisions of S. 1283, as amended, will further the congressional intent that the magistrate assist the district judge in a variety of pretrial and preliminary matters thereby facilitating the ultimate and final exercise of the adjudicatory function at the trial of the case.

The Federal Rules of Civil Procedure provides many opportunities for the parties by motion to invoke a decision of the court. These opportunities range from a motion under Rule 6(b) to extend the time for an act, or a motion under Rule 4(e) specifying the manner of serving a summons, to a motion under Rule 12(b) to dismiss, or a motion under Rule 56 for summary judgment on the grounds that there is no genuine issue of fact to justify a trial. In between these extremes are various motions relating to discovery, to production of evidence, to physical examination of a party, to join necessary or proper parties, to set the time and place of a disposition, to suppress evidence, and to hold a pretrial conference under Rule 16, and others too numerous to mention.

Without the assistance furnished by magistrates in hearing matters of this kind, and others not specifically named, it seems clear to the committee that the judges of the district courts would have to devote a substantial portion of their available time to various procedural steps rather than to the trial itself.

Therefore, the committee has concluded that the enactment of S. 1283, as amended, will further improve the judicial system by clearly

defining the additional duties which a judge of the district court may assign to a magistrate in the exercise of the discretionary power to so assign as contained in Section 636(b) of Title 28 United States Code as herein amended.

Before turning to a detailed explanation of the bill, the committee believes that it should comment upon the contention that Article III of the Constitution imposes a limitation upon the judicial functions which this bill vests in a magistrate. In the federal court system, the primary court of general jurisdiction has always been the district court and, as such, it is an "inferior court" ordained and established by the Congress under Article III. But this is not to say that the Congress may not create other inferior courts. For example, it is believed that it would be competent for the Congress to create below the district courts a court of limited jurisdiction which would be roughly the equivalent of a municipal court in some of the state systems. Multi-tiered court systems developed simply in recognition of the fact that certain cases and judicial functions are of differing importance so as to justify different treatment by the court system. While the U.S. District Court has long been a single tiered court as far as original jurisdiction is concerned, the Congress has nevertheless recognized that it is not feasible for every judicial act, at every stage of the proceeding, to be performed by "a judge of the court".

In several instances, the Congress has vested in officers of the court, other than the judge, the power to exercise discretion in performing an adjudicatory function, subject always to ultimate review by a judge of the court. For example, a judgment or order of a referee in bankruptcy, adjudicating legal rights, is a final order unless an appeal is taken to a judge of the district court. Title 11 U.S.C., section 67(c); Rule 801, Rules of Bankruptcy Procedure.

Also, section 636(a)(3) of Title 28 vests in the magistrates the power to try persons accused of minor criminal offenses, which power was formerly vested in a United States Commissioner. Thus, under section 3401 of Title 18 United States Code, the magistrate has jurisdiction to try minor offenses and under section 3402 of Title 18, an appeal may be taken from the judgment of the magistrate to a judge of the district court.

Finally, section 1920 of Title 28 United States Code authorizes "a judge or clerk of any court" to tax costs in a case. Rule 54(d) of the Rules of Civil Procedure implements section 1920 by providing that costs may be taxed by the clerk on one day's notice and that on notice "the action of the clerk may be reviewed by the court". Therefore, by analogy, the committee believes that the judicial functions vested in the magistrates, as a judicial officer, by this bill are not in violation of Article III of the Constitution.

Explanation of the Bill

No changes are made in section 636(a) of title 28 under which magistrates exercise the powers with respect to issuance of arrest warrants, search warrants, setting bail, preliminary hearings, and the trial of minor and petty offenses under section 3401 of title 18, United States Code.

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The bill revises in its entirety section 636(b) under which magistrates could be assigned certain additional duties in the discretion of the court. This discretionary power to assign additional duties to a magistrate is continued but the discretion is vested in a judge of the district court rather than in a majority of all the judges of the court. Of course the scope of any permissible additional duties to be assigned can still be agreed upon by a majority of the judges, but the bill will permit exercise of the actual power of assignment to a single judge. Since assignments are frequently made in individual cases, or on an ad hoc basis, it seems preferable to vest the power in a single judge who can execute any required order of assignment or reference.

The initial sentence of the revised section uses the phrase "notwithstanding any provision of law to the contrary—". This language is intended to overcome any problem which may be caused by the fact that scattered throughout the code are statutes which refer to "the judge" or "the court". It is not feasible for the Congress to change each of those terms to read "the judge or a magistrate". It is, therefore, intended that the permissible assignment of additional duties to a magistrate shall be governed by the revised section 636(b), "notwithstanding any provision of law" referring to "judge" or "court".

The additional duties which can be assigned to a magistrate are classified into three categories set forth in subparagraphs (A) and (B) of subsection 636(b)(1) and in subsection 636(b)(2). These categories and the scope of the magistrate's authority are as follows:

1. Pretrial matters.—Under subparagraph (A) a judge, in his discretion, may assign any pretrial matter to be heard and determined by a magistrate. In scope, this includes a great variety of preliminary motions and matters which can arise in the preliminary processing of either a criminal or a civil case. As indicated by the statistical table set forth earlier in this report many of the magistrates are already hearing these pretrial matters under the authority contained in subsection 636(b)(2) of the present law. A statement was received at the Senate hearing on July 16, 1975, from Chief Judge Belloni of the District of Oregon setting forth a description of the various motions and pretrial proceedings which have been assigned to Magistrate Juba by the judges of the Oregon Court. A similar scope of additional duties is intended for magistrates under the provisions of S. 1283, as amended. Thus, the revised law will not unduly extend the magistrates' authority to hear pretrial matters but it will clarify the broad authority to refer "any pretrial matter".

Subject to the exception of the dispositive motions expressly named in subparagraph (A), the magistrate shall have the authority to not only hear the pretrial matter but also to enter an order determining the issue raised by the motion or proceedings. The magistrate's determination is intended to be "final" unless a judge of the court exercises his ultimate authority to reconsider the magistrate's determination.

The last sentence of subparagraph (A) makes it clear that a judge of the court has the ultimate judicial prerogative to review and reconsider a motion or matter "where it has been shown that the magistrate's order is clearly erroneous or contrary to law". The standard of "clearly erroneous or contrary to law" is consistent with the accepted and existing practice followed in most district courts when reviewing a pretrial matter assigned to a magistrate under existing law.

Use of the words "may reconsider" in subparagraph (A) is intended to convey the congressional intent that a matter "heard and determined" by the magistrate need not in every instance be heard a second time by the judge. However, if a party requests reconsideration based upon a showing that the magistrate's order is clearly erroneous or contrary to law then the judge must reconsider the matter. Of course, the judge has the inherent power to rehear or reconsider a matter *sua sponte*.

Thus, the revision proposed in this bill makes it clear that Congress intends that the magistrate shall have the power to make a determination of any pretrial matter (except the enumerated dispositive motions) and that his determination set forth in an appropriate order shall be "final" subject only to the ultimate right of review by a judge of the court. Under section 631 of the Magistrate Act (28 USC 631), a magistrate is required to be a member of the bar whose experience in the practice of law has been such as to persuade the appointing judges that he is competent to perform the duties of the office. If a particular magistrate does not have this competence it is assumed that a judge would not assign particular matters to the magistrate for hearing and determination. However, assuming such competence, it seems to the Committee to be inefficient and duplicative to require a "report and recommendation" from the magistrate to the judge as a prelude to a separate order by the judge in order to dispose of preliminary and pretrial matters. Thus the statute uses the term "hear and determine" in vesting the authority of a magistrate, subject, of course, to ultimate review by the court.

While subparagraph (A) does not specify a procedure to be followed by a party in obtaining reconsideration of a magistrate's order by the judge, it would normally be by motion duly served, filed and noticed. However, in some districts the local rules now in existence provide merely that the request for review be in a letter or other written form. Nor is a fixed time specified within which to obtain review of a magistrate's order in "any pretrial matter", since what is a timely request to a judge of the court will depend upon the nature of the pretrial matter. For example, an order by the magistrate under Rule 13(f) granting leave to serve and file an amended pleading asserting an omitted counterclaim, could be reviewed by a judge in due course and at a time set by the court or noticed by the parties. In such an instance there would be ample time within which the matter could be reconsidered. On the other hand, suppose a pretrial order under Rule 16 is issued by the magistrate following a pretrial conference held a week or less before a day certain setting for trial. In that instance, time is of the essence and review of the order by a judge should be sought and the matter reconsidered as soon as possible. Thus, under subparagraph (A), it is intended that the method and procedure for seeking reconsideration of a magistrate's determination of a pretrial matter can be set by local rules of court pursuant to section 636(b)(4), or by uniform rules, if uniformity is deemed necessary.

2. Dispositive motions, Habeas Corpus, and Prisoner Petitions.—As stated previously in this report, certain motions which are dispositive of the litigation are specifically excepted from the magistrate's power under subparagraph (A) "to hear and determine". These excepted motions are:

(1) A motion for injunctive relief;
(2) A motion for judgment on the pleadings,
(3) A motion for summary judgment;
(4) A motion to dismiss or quash an indictment made by the defendant;
(5) A motion to suppress evidence in a criminal case;
(6) A motion to dismiss for failure to state a claim upon which relief can be granted; and,
(7) A motion to involuntarily dismiss an action for failure to comply with an order of the court.

It is not intended that a magistrate shall have the power under subparagraph (A) "to hear and determine" such dispositive motions. However, depending upon the qualifications and competence of a particular magistrate, it is intended that under subparagraph (B) a judge of the court, in his discretion, may assign such dispositive motions to a magistrate for hearing and submission of proposed findings and recommendation to a judge of the court for ultimate disposition.

Not only may these dispositive motions be assigned to the magistrate under subparagraph (B) but also there may be assigned application for posttrial relief made by individuals convicted of criminal offenses and petitions under section 1983 of title 42 United States Code brought by prisoners' challenging the conditions of their confinement. The authority of the magistrate under subparagraph (B) is clearly more than authority to make a "preliminary review". It is the authority to conduct hearings and where necessary to receive evidence relevant to the issues involved in these matters. Therefore, passage of S. 1283, as amended, will supply the congressional intent found wanting by the Supreme Court in *Wingo* v. *Wedding*, supra. Also this bill will overcome the effect of the decision in *T.P.O.* v. *McMillan*, supra, relating to motions to dismiss or motions for summary judgment. Further, passage of this bill will also permit a judge to refer to a magistrate the consideration and study of cases brought to review the Secretary's determination of entitlement to benefits under the Social Security Act, since these matters usually involve a motion by the agency for summary judgment.

Under subparagraph (B) the magistrate is required to submit proposed findings and his recommendation to the judge for disposition of the various proceedings included in subparagraph (B). As specified in subparagraph (C) a copy of the proposed findings and recommendation must be mailed to all parties. Written objections must be filed within 10 days. This is substantially the procedure and the time limit specified in Rule 53 where there has been a reference to a master. The bill would permit the court by local rules to specify whether the written objections must be in the form of a motion or other written form, as well as to specify any procedure for bringing the matter on for a formal hearing, if a formal hearing is to be required.

The judge is given the widest discretion to "accept, reject or modify" the findings and recommendation proposed by the magistrate, including the power to remand with instructions. Thus, it will be seen that under subparagraph (B) and (C) the ultimate adjudicatory power over dispositive motions, habeas corpus, prisoner petitions and the like is exercised by a judge of the court after receiving assistance from and the recommendation of the magistrate.

3. Special Master and Trial by Consent.—The third category of magistrates' additional duties is set forth in the proposed subsection 636(b)(2). The subsection expressly authorizes the magistrate to be appointed as a special master under Rule 53 of the Federal Rules of Civil Procedure. This merely carries forward the same provision in section 636(b)(1) of the existing law. This also carries with it a requirement that if a party objects to the reference to a master, the requirements and restrictions of Rule 53 must be met.

The second sentence of this subsection provides an exception to this the magistrate, to serve where one of the parties objects to the reference. This exception takes such cases out from the restrictions of Rule 53(b), which limits the conditions under which cases may be referred to a master, since no significant purpose is served by restricting the use of magistrates where the parties agree to this procedure. At the same time, Rule 53 contains many important rules governing the powers of masters, the conduct of proceedings before them, and the submission of reports. Thus, subsection 636(b)(2) retains these provisions in any case in which a magistrate is appointed as a special master.

Enactment of this new subsection 636(b)(2), and experience in the use of magistrates as special masters, may serve to occasion a reappraisal of the power of the court to appoint a special master, i.e., the magistrate, to serve where one of the parties objects to the reference. [See, *La Buy* v. *Howes Leather Co.* (1957), 352 U.S. 249.][4] Indeed, the magistrate is not an attorney in private practice "appointed on an ad hoc basis" and the magistrate is experienced in judicial work.

Other Provisions of the Bill

Proposed subsection 636(b)(3) provides for the assignment to a magistrate of any other duty not inconsistent with the Constitution and laws of the United States. A similar provision is contained in the existing legislation. This subsection enables the district courts to continue innovative experimentations in the use of this judicial officer. At the same time, placing this authorization in an entirely separate subsection emphasizes that it is not restricted in any way by any other specific grant of authority to magistrates.

Under this subsection, the district courts would remain free to experiment in the assignment of other duties to magistrates which may not necessarily be included in the broad category of "pretrial matters". This subsection would permit, for example, a magistrate to review default judgments, order the exoneration or forfeiture of bonds in criminal cases, and accept returns of jury verdicts where the trial judge is unavailable. This subsection would also enable the court to delegate some of the more administrative functions to a magistrate, such as the appointment of attorneys in criminal cases and assistance in the preparation of plans to achieve prompt disposition of cases in the court.

If district judges are willing to experiment with the assignment to magistrates of other functions in aid of the business of the courts, there will be increased time available to judges for the careful and unhurried performance of their vital and traditional adjudicatory duties, and a consequent benefit to both efficiency and the quality of justice in the Federal courts.

4. 77 S.Ct. 309, 1 L.Ed.2d 290.

Proposed subsection 636(b)(4) permits each district court to adopt local rules of court governing the performance of these duties by magistrates in the district. This requirement is carried over from the existing statute. It ensures that a magistrate will not be so burdened by assignments from one judge that he cannot assist the other judges in the district. Further, by requiring the promulgation of such local rules of the court, the statute provides the local bar at least some advance notice of the potential assignment of a case to a magistrate. As discussed previously in this report, these local rules may also specify procedures for obtaining reconsideration of a magistrate's order under subparagraph (A) and may supplement the procedure for objection to proposed findings and recommendations under subparagraphs (B) and (C).

BACKGROUND

S. 1283 was passed by the Senate on Feb. 5, 1976. Hearings on the issue of magistrate jurisdiction were held in the Senate Judiciary Subcommittee on Improvements in Judicial Machinery on July 16, 1975, and in this Committee's Subcommittee on Courts, Civil Liberties, and the Administration of Justice on June 20, 1975, and July 18, 1975, when the original H.R. 6150 was being considered. The bill has the support of the Justice Department, the Administrative Office of the U.S. Courts, and the Judicial Conference. It also has the personal support of many judges who have written to express their needs for increased assistance from the magistrates. One judge, the Hon. Damon J. Keith (Chief Judge, U.S. District Court for the Eastern District of Michigan) wrote Mr. Kastenmeier that the Speedy Trial Act's implementation, the 300% increase in criminal case filings in the past six years, among other reasons, necessitated this legislation. On the national level, civil and criminal filings rose by 12% in the federal district courts. The need for this legislation is apparent, and this Committee voted to report it favorably on Sept. 15, with the previously mentioned amendments.

OVERSIGHT

Oversight of the federal courts and magistrate system is the responsibility of the Committee on the Judiciary. S. 1283, as well as S. 2923, is a response to the needs for increased assistance to the federal judges.

STATEMENT OF THE COMMITTEE ON GOVERNMENT OPERATIONS

No statement has been received on the legislation from the House Committee on Government Operations.

STATEMENT OF THE CONGRESSIONAL BUDGET OFFICE

Pursuant to clause 7, rule XIII of the Rules of the House of Representatives, and section 403 of the Congressional Budget Act of 1974, the Committee estimates there is no cost to the legislation. The CBO letter follows.

APPENDIX 12

WORDS AND PHRASES

PERMANENT EDITION

1658 TO DATE

Volume 8

Common—Condition Subsequent

All Judicial Constructions and Definitions of Words and Phrases by the State and Federal Courts From the Earliest Times, Alphabetically Arranged and Indexed

Kept to Date by Cumulative Annual Pocket Parts

ST. PAUL, MINN.
WEST PUBLISHING CO.
APPENDIX 12
page A89

CONDENSER—Cont'd

of soft iron is wound a certain number of turns of copper wire, each turn being insulated by a layer of paper or some other insulating material; then on top of this coarser wire is wound, in the same direction, a large number of layers of very thin wire, each one likewise insulated by a layer of paper or other insulating material, and the fine wires connect with the two poles on top, and the coarser wires connect with the lower, with the commutator running from one pole to the other. This box is filled with what is called "condenser," which is a series or number of plates of tin foil, that stores up electricity somewhat on the principle of the Leyden jar and keeps it stored, so that when a person uses it he gets a much greater shock than he would if the condenser was not there. It is used in schools and universities, by physicians, and to explode mines and dynamite cartridges. It has no practical use in telegraphing, and is commonly used for illustrating the law of electrical induction. It is a "philosophical instrument," within the tariff acts. Robertson v. Oelschlaeger, N.Y., 11 S.Ct. 148-150, 137 U.S. 436, 34 L.Ed. 744.

CONDIMENT

A "condiment" is something used to give a relish to food and to gratify the taste, usually a pungent and appetizing substance, as pepper or mustard, seasoning. U. S. v. 254 Cases and 499 Cases, Each Containing 48 Cans, of an Article Labeled, in part, "Net Contents 10 oz. Avoir. Baby Brand Tomato Sauce", D.C.Ark., 63 F.Supp. 916, 923.

A "condiment" is a "food" and not a "medicine." The "International stock food" is a "food or condiment" within the meaning of the Kentucky pure food law, Laws Ky. 1906, c. 48, and its sale is subject to regulation thereunder. Savage v. Scovell, C.C.Ky., 171 F. 566.

Chewing tobacco is not a food, "beverage," "condiment," or a drug, but the manufacturer must exercise great care to see that it does not contain poisonous substances. Pillars v. R. J. Reynolds Tobacco Co., 78 So. 365, 368, 117 Miss. 490.

"Condiment," according to Webster, and as generally understood, is something "used to give relish to food and to gratify the taste; a pungent and appetizing substance; seasoning." Capers, which are pungent flower buds, when pickled in vinegar and

CONDIMENT—Cont'd

intended for use in flavoring sauces and as a relish are a "condiment," dutiable under Act 1897, par. 241, 30 Stat. 170, as "pickles and sauces of all kinds," rather than as provisions. S. S. Pierce Co. v. United States, C.C.Mass., 176 F. 440, 441, 443, 444.

CONDITION

CONDITION—Cont'd

In general

Where insurance policy used both disease or "condition," the latter word is more elastic and significant in its nature than the former and means the state or mode in which a person or thing exists. Union Casualty Co. v. Montelione, 8 O.L.A. 327.

Under § 3283, Rev.Stat., authorizing municipality and railroad company to agree upon manner, terms and conditions upon which public street or other ground may be used or occupied by railroad, "manner" means the method or mode by which tracks are laid; "terms" means the boundary, limit or extent of the grant; and "conditions" means stipulations precedent to enjoyment of the grant. Cleveland, C. C. & St. L. Ry. Co. v. City of Cincinnati, Goebel's Prob.R. 269.

A distinction between "conditions" and "exceptions" is that a condition subsequent always presupposes an absolute obligation which is to be avoided or annulled, whereas an exception is an exclusion from a general obligation of a certain class or classes, which, were it not for the exclusion would be comprehended within the subject covered by the general obligation. Clemens v. Mutual Reserve Fund Life Ass'n, 11 Ohio Dec. 717, 8 Ohio N.P. 587.

"Conditions" are provisions in contracts, charters and deeds, upon which the existence of a right depends; a provision that the existence of the right shall exist upon the happening or not happening of some event. Newark Gas & Fuel Co. v. City of Newark, 8 Ohio Dec. 418, 421, 7 Ohio N.P. 76.

Credit for prior teaching experience was a "condition" within statute providing that salary of teacher might not be less than that

In gener Cont'd

fixed by s...dules and schedule "conditions" adopted by board of education and on file in office of State Commissioner of Education. Kramer v. Board of Ed. of City of New York, 84 N.Y.S.2d 874, 877, 194 Misc. 128.

The word "condition" is the equivalent of "requisite" or "requirement" and denotes something attached to and made a part of a grant or privilege. Chambers v. Owens-Ames-Kimball Co., 67 N.E.2d 439, 442, 146 Ohio St. 559, 165 A.L.R. 1373.

Recourse against property of operator and subrogation of owner to rights against operator as "conditions" to statutory liability of owner of motor vehicle for injuries from use. Baugh v. Rogers, Cal., 148 P.2d 633, 639, 152 A.L.R. 1043.

The words "school purposes" within deed do not create a "condition" on the fee. Board of Education of Taylor County v. Board of Education of City of Campbellsville, 166 S.W. 2d 295, 296, 292 Ky. 261.

A statement in contract of sale descriptive of thing sold, if intended to be part of contract, is a "condition". Iuliucci v. Rice, 32 A.2d 459, 461, 130 N.J.L. 271.

The governor in exercising powers of commutation of sentence may attach reasonable conditions to his act of clemency and they become a "condition" of the benefit granted to the prisoner. People ex rel. Von Moser v. New York State Parole Board, 39 N.Y.S.2d 200, 202, 179 Misc. 397.

"Condition" referred to any condition imposed upon the United States in permitting alien to re-enter his home country pursuant to deportation order, and did not preclude deportation to country which imposes any condition upon deportee after his re-entry. Glikas v. Tomlinson, D.C.Ohio, 49 F.Supp. 104, 108.

The word "conditions" as used in Uniform Sales Act provision authorizing seller to reserve right of possession or property in goods until certain conditions have been fulfilled does not indicate legislative intent that only one condition can be imposed which must be certain. In re Halferty, C.C.A.Ill., 136 F.2d 640, 644.

Existence of trust receipt on conditionally sold trucks did not affect the sale contract and was not a "condition" of the sale within statute requiring conditional sales contracts to contain all the "conditions" of the sale,

In general— t'd

where anyone acquiring buyer's rights under the sale contract would take the trucks free of intruster's security interest. Premium Commercial Corporation v. Kasprzycki, 29 A.2d 610, 613, 614, 129 Conn. 446.

Conditional sale contract of trucks was not invalid as failing to contain all the "conditions" of the sale because it referred to the dealer holding the trucks under a trust receipt, as the "seller", where the receipt so far as the buyer was concerned authorized the seller to sell the trucks and he had sold the trucks to the buyer. Premium Commercial Corporation v. Kasprzycki, 29 A.2d 610, 613, 614, 129 Conn. 446.

Where intruster under trust receipt of trucks was given a security interest to secure a loan from the intruster to the holder of the trucks, intruster was given a "lien" on the trucks and "title" remained in the holder, and hence holder's conditional sale contract representing that holder had title and providing that it should remain in him was not invalid as inaccurately stating the "conditions" of the sale. Premium Commercial Corporation v. Kasprzycki, 29 A.2d 610, 613, 614, 129 Conn. 446.

The co-operation clause of an automobile liability policy constituted a material "condition" of the policy. Cameron v. Berger, 7 A.2d 293, 295, 336 Pa. 229.

A city sewer discharging offensive unpurified effluent into a stream so as to create a nuisance was the "proximate cause" of the nuisance and not a "condition", entitling a lower riparian owner to recover from city. Huber v. City of Blue Earth, 6 N.W.2d 471, 473, 213 Minn. 319.

The amendment of Street Improvement Act requiring a suit to foreclose lien of improvement bond to be maintained within four years after due date of last installment is a "statute of limitation" rather than a "condition" restrictive of a litigant's right to proceed. Ritter v. Franklin, 123 P.2d 866, 868, 50 Cal.App.2d 844.

Diligence in rescinding a contract is "mandatory" and is a "condition" of right to rescind, and, in action for rescission, complaint showing unreasonable delay is demurrable unless it states sufficient facts to show that, notwithstanding delay, there was diligence under the facts pleaded. Clanton v. Clanton, 126 P.2d 639, 642, 52 Cal.App.2d 550.

In general—Cont'd

Under contract for sale of corporate stock creating fund from which buyer as trustee was to pay debts of corporation, irregularity in purchaser's handling of fund did not release sellers from agreement for payment of corporation's expenses from fund, since purchaser's duty to follow designated procedure arose from "promise" and not a "condition." Johnston v. Rothwell, 87 P.2d 13, 15, 54 Wyo. 99.

The statement that an act or omission is a "condition" and not a cause of an occurrence from which injury results means no more than that it is not a "proximate cause" of that occurrence. Kinderavich v. Palmer, 15 A.2d 83, 88, 89, 127 Conn. 85.

Conduct having only a remote connection with production of accident has been spoken of as a "condition" rather than a cause of the final occurrence, but properly understood, to say that conduct is a "condition" rather than a cause means no more than that it is a remote and not a proximate cause, a remote circumstance which merely gave rise to the occasion for the injury. Kinderavich v. Palmer, 15 A.2d 83, 88, 127 Conn. 85.

"Unconditional ownership" of property required by standard fire insurance policy is an ownership of an estate without condition, and the word "condition" does not refer to a title which is defective but not conditional. Miller v. Yorkshire Ins. Co., 297 N.W. 377, 379, 237 Wis. 551, 133 A.L.R. 1341.

Under life policy providing for disability benefits insured shall become totally and permanently disabled, subject to "conditions and provisions" that insured shall furnish proof of disability and that premiums following receipt of proof will be waived, the making of proofs of disability within any limit of time and before death was not made a "condition" of liability to pay disability benefits. Love v. Northwestern Nat. Life Ins. Co., C.C.A.Tex., 119 F.2d 251, 253.

Under a conveyance of a house and lot upon the consideration of a certain sum to be spent for repairs thereon and "agreement of the party of the second part, my son, to furnish me and my husband a home as long as we live", such agreement by the grantee was not a "condition" to the vesting of absolute title in grantee, but merely an obligation, the failure to comply with which would not de-

In general— t'd

feat grantee's title, but merely give rise to cause of action for damages. House v. House, 13 S.E.2d 817, 819, 191 Ga. 678.

Where testatrix devised residue of estate to devisees in fee simple and by subsequent clause empowered executrix to convey all property owned by testatrix at her death and to give good title, clause giving executrix power to sell the property was not inconsistent with the devise in fee simple, but devisee took land in fee subject to the power of sale given to executrix which power of sale was not a limitation on the fee but a "condition" attached to it. William's Guardian v. Ferrell's Ex'x, 151 S.W.2d 1029, 1030, 286 Ky. 754.

Where appropriation for legal services for the state contained recital that all attorneys authorized by the act to be employed by any department or agency and all attorneys compensated out of any moneys appropriated by the General Assembly should be appointed by the Attorney General and be in all respects subject to statute which placed the Attorney General in charge of the commonwealth's department of law, the recital was a "provision" or "condition" which told by whom the attorneys were to be employed and from what source they could expect compensation, and was not an "item" within Governor's veto power. Commonwealth v. Dodson, 11 S.E.2d 120, 130, 176 Va. 281.

Legislative declaration that no part of money appropriated for administration of state planning board should be used for the investigation of county government was a "condition" and was not an "item" within Governor's veto power. Commonwealth v. Dodson, 11 S.E.2d 120, 130, 176 Va. 281.

A "condition" will not be raised by implication for mere declaration in deed that grant is made for special and particular purpose, without being coupled with words appropriate to make such condition, but such recitals are usually construed as giving rise, at most, to implied covenant that grantee will use property conveyed only for specified purpose. Williams v. Johnson, 143 S.W.2d 738, 739, 740, 284 Ky. 23.

A provision in contract of sale of a used engine to mining company that seller, a foreign corporation, would dismantle engine from its location, reinstall it on mining company's property, and run a test, was a "guar-

In general—Cont'd

anty" which was fulfilled, and was not a "condition" intended to survive its acceptance and give purchaser further time for trial and examination. Chiquita Mining Co. v. Fairbanks, Morse & Co., 104 P.2d 191, 195, 60 Nev. 142.

Where defendant, operating truck on highway consisting of four paved lanes and wide, hard, dry shoulders, stopped truck on paved portion of highway to replace dragging spare tire, failed to turn on lights or put out flares, and decedent collided with rear of defendant's truck, whether the presence of the unlighted truck on the paved portion of the highway was a mere "condition" and not the "proximate cause" of the collision was for the jury. Wilson v. Decatur Cartage Co., 39 N.E.2d 379, 313 Ill.App. 148.

Where adult plaintiff, in violation of ordinance, was riding on handle bars of bicycle along narrow street on which cars were parked solidly on both sides and an automobile was passing in approximately the center of the street, and bicycle struck large hole in street which could not have been avoided, the hole was "proximate cause" of accident and plaintiff's violation of ordinance was merely a "condition" which made possible his propulsion into the path of the automobile to his injury, and did not bar his recovery from the city. Penwitt v. City of Chicago, 43 N.E.2d 159, 161, 315 Ill.App. 444.

The presence of smoke, snow, fog, mist, blinding headlights or other similar elements, materially impairing or wholly destroying visibility of objects ahead of motorist, are not "intervening causes", absolving such motorist from liability for death of pedestrian struck by automobile, but "conditions" imposing on motorist duty to assure safety of public by exercising degree of care commensurate with such surrounding circumstances. Nichols v. Havlat, 1 N.W.2d 829, 834, 140 Neb. 723.

Where by-law of association organized under Maryland law permitted member to withdraw capital contribution on 15 days' notice but association reserved right to withhold the contribution until withdrawing member had removed all advertising matter indicating membership, the by-law provision was binding on a member as a "condition" of receiving refund of capital contribution. Progressive Grocers' Ass'n v. Golden, 128 F.2d 318, 319, 76 U.S.App.D.C. 21.

In general—Cont'd

Under Fair Labor Standards Act provision granting Administrator power to issue subpœna duces tecum, the Administrator is not obliged as a "condition" of obtaining an enforcement order of his subpœna, issued in an investigation to determine whether any person has violated any provision of the act, to make any showing that employer is engaged in commerce, since there is no limitation of the character of business done by the person investigated. Application of Holland, D.C.N.Y., 44 F.Supp. 601, 602.

In action for death of decedent who while riding on left running board of truck was crushed in collision with tractor trailer, an instruction that if decedent's negligence was a proximate cause of death, recovery could not be had but that if decedent merely afforded an opportunity for negligence of either or both defendants to result in death and was not a contributing cause, jury might find that decedent's negligence was a mere condition and not the proximate cause of death, was not erroneous as failing to distinguish between a cause and a "condition" which means that conduct involved is a remote and not a proximate cause. Cosgrove v. Shusterman, 26 A.2d 471, 474, 125 Conn. 1.

In action by infant wife for maintenance, wherein husband counterclaimed for divorce on ground of adultery, characteristics expressed in terms of blood grouping would be regarded as part of "physical condition", and wife, though suing by next friend, and child, would be regarded as "parties" within rule providing that in an action in which mental or "physical condition" of a "party" is in controversy, the court may order a physical examination, so that court had jurisdiction to order wife and child to submit to a blood grouping test for comparison of their blood with that of husband. Rules of Civil Procedure for District Courts, rules 17 (a), 35(a), 28 U.S.C.A. following section 723c; D.C.Code 1929, T. 14, § 75. "Condition" is a broad word. Among its meanings are quality, property, attribute, characteristic. Beach v. Beach, 114 F.2d 479, 481, 72 App.D.C. 318, 131 A.L.R. 804.

Where a husband, while owning realty with wife as tenants by entireties, gave mortgages on realty without joinder of wife, and husband and wife thereafter joined in deed conveying their title by entireties to bankrupt

In general—Cont'd

and another as tenants in common, "under and subject, nevertheless, to the payment of two mortgage debts * * *", quoted recital was a "condition" upon which bankrupt's title vested and depended, and doctrine of "estoppel by deed" was applicable precluding bankrupt from questioning validity of mortgages as to bankrupt's undivided one-half interest in realty, and hence mortgagee's petition for order that trustee's title to undivided one-half interest be declared subject to mortgage should have been granted especially where bankrupt estate had no equity over and above the mortgage. In re Solomon, D.C.Pa., 40 F.Supp. 62, 65.

Where government which was holder in due course of note executed by buyer for purchase price of heating system sent buyer letter suggesting that buyer sign release authorizing government representative to remove equipment and stating that when release was returned properly signed and possession of equipment had been obtained by government, buyer would be released and buyer signed release but government did not take possession of the equipment, the government required as a "condition" of accord that it obtain possession of the heating system and burden was on buyer to prove satisfaction of the accord. United States v. Jollimore, D.C. Mass., 44 F.Supp. 639, 641.

Statute requiring alternate plans and specifications for highway paving, where conditions do not require use of particular type, had purpose of making choice of type matter to be determined by competitive bidding, and "conditions" referred to physical conditions, not economic factors. Landsborough v. Kelly, 37 P.2d 93, 94, 1 Cal.2d 739, 96 A.L.R. 707.

A "condition" is something inserted in a deed for the benefit of the grantor, giving him the power, on default of performance, to destroy the estate if he will, and revest the estate in himself or his heirs. Smith v. Smith, 23 Wis. 176, 181, 99 Am.Dec. 153. A condition not only depends on the option of the grantor, but is controlled by equity in any case where the grantor attempts to make an inequitable use of it. Duryee v. City of New York, 96 N.Y. 477, 496.

Under Burns' Ann.St.1901, § 373, providing that in pleading the performance of a condition precedent in a contract it shall be sufficient to allege generally that the party

In general—Cont'd

performed all the "conditions" on his part, an allegation in an action on a policy "that plaintiff fully performed all the obligations required of her" was a substantial compliance with the statute. Security Accident & Sick Ben. Ass'n v. Lee, 66 N.E. 745, 746, 160 Ind. 249.

The word "condition," in Act March 20, 1897, § 2, providing that the warranty of any fact or "condition" incorporated in any policy of insurance purporting to be made or assented to by the assured, which shall not materially affect the risk insured against, shall be construed as representations only in any suit at law or equity on such policy, refers to facts existing, or said or supposed to exist, at the time the policy is made. Hoover v. Mercantile Town Mut. Ins. Co., 69 S.W. 42, 44, 93 Mo.App. 111.

"Receipts," whether for money or for property, are informal, nondispositive writings, open to explanation, modification, or contradiction by parol evidence. They may be of twofold character. It may be not only an acknowledgment or admission of the receipt of money or property in payment or satisfaction of a debt, but it may contain a contract distinct and independent, or, as expressed by Mr. Greenleaf, "terms, conditions, and agreements or assignments." Willoughby v. Hannon, 47 So. 241, 156 Ala. 585, adopting definition in Gravlee v. Lamkin, 24 So. 756, 120 Ala. 221.

Where practically all the output of a china manufacturer was sold to the United States, special classes manufactured for European trade cannot be said to be in "condition" to supply the American trade, within the meaning of Customs Administrative Act June 10, 1890, c. 407, § 19, 26 Stat. 139, providing that dutiable value shall be determined according to the "condition in which * * * merchandise is there bought and sold for exportation to the United States." United States v. Haviland & Co., C.C.N.Y., 167 F. 414, 418.

Within Code, § 3252, providing that no condition or restricted provision of a policy of insurance shall be valid as a defense to an action on the policy unless printed in certain sized type, the term "conditions" was not used in any narrow or technical sense, but was intended to cover any clause, expression, or provision included in or appended to a policy whereby the effect of the principal

In general—Cont'd

an essential part of the policy is modified, changed, restricted, or otherwise affected so as to materially influence the rights and liberties of the insurer thereunder; and it is of no consequence whether the language used be in the form of a condition or agreement. National Life Ass'n v. Berkeley, 34 S.E. 469, 97 Va. 571

A judgment granting the husband, because of the wife's use of intoxicants, a limited divorce for two years, though providing that at the end of two years either party "may proceed in the action as he or she shall deem for her best interest," is not an interlocutory judgment, authorized by St.1898, § 2883, in case of a decision leaving some condition to be performed; leaving it to the husband to ask for an absolute divorce at the end of the two years, on the record as it stood at the time of the trial, if in the meantime the parties had not been reconciled, though the wife had reformed, if such be the intent of the provision of the judgment, not being a "condition" within the meaning of the statute. Graham v. Graham, 136 N.W. 162, 163, 149 Wis. 602.

A complaint having predicated the negligence of the master on a "defect in the condition" of the ways, works, etc., a demurrer, in that the count showed no defect in the ways, work, etc., was inapt, under the statute permitting a recovery for a "defect in the condition" of, etc. The employment of the word "condition" widens the statute beyond what would have been its scope had only the word "defect" been used. If one claiming under the statute must show a defect in the ways, the effect would be to counteract the right therein declared, and this by denying the word "condition" its proper influence. Jones v. Tennessee Coal, Iron & R. Co., 50 So. 1017, 163 Ala. 266.

A "condition" is a qualification annexed to any estate whereby it is to arise, in which case it is called a "condition precedent" or is to be defeated, when it is styled a "condition subsequent." A deed in consideration of natural love and affection, whereby land is granted, bargained, sold, and released to the grantee, on condition that she shall hold and enjoy the same for life, and after her death to go to all her children, "to have and to hold all the premises heretofore mentioned unto said grantee, her heirs and assigns, forever," conveys a title in fee simple, and en-

In general—Cont'd

titles grantee's husband to a third interest therein on the death of the grantee; the condition being but an effort to set limitations on the fee simple, and cut it down to a life estate in the grantee not within the power of the grantor to accomplish. Chavis v. Chavis, 35 S.E. 507, 508, 57 S.C. 173.

The word "condition" is defined by Mr. Webster to mean "the mode or state of being; state or situation with regard to external circumstances; essential quality; property; attribute." Under an ordinance requiring a street railway company to keep the portions of streets between its railway tracks and two feet on each side thereof in as good repair and condition as the city keeps the balance of the streets, it is the duty of the company to pave the portions of streets between its said tracks, and two feet on each side thereof, when the city paves the balance of the streets. For when the city paves, if the company decline so to do, it cannot be said that it keeps the parts of the streets in question in as good condition, or in as good state of being or essential quality, as the city keeps the balance. In order to meet this obligation, the company must also pave. State v. Jacksonville St. R. Co., 10 So. 590, 596, 29 Fla. 590, 613, quoting Webster, Dict.

In an action for breach of contract to purchase coal, making fulfillment dependent upon "normal conditions," excusing seller's failure to deliver in case of "war, • • • insurrection, • • • disasters, breakdowns, fires, or other accidents at the mines, • • • shortage of cars, interruption of car service, strikes, labor agitations or disturbances, shortage of labor supply, or any other causes beyond the seller's control" and excusing buyer's refusal to accept deliveries "in case of strikes or other contingencies arising which are beyond the control of the buyer and which cause stoppage or partial stoppage of the plant or business of the buyer," the closing down of buyer's steel plant, because of business depression and the failure to obtain orders, did not justify buyer's refusal to accept deliveries, since the word "conditions" in the phrase "normal conditions" meant physical conditions affecting the industry and not general economic conditions, and the phrase "other contingencies" did not include business depressions, in view of the ejusdem generis rule. Cleveland & Western Coal Co. v. Cyclops Steel Co., 123 A. 320, 321, 278 Pa. 346.

and to a third interest of the grantee; the condition effort to set limitations and cut it down to a life not within the power accomplish. Chavis v. 508, 57 S.C. 173.

dition" is defined by Mr. mode or state of being; th regard to external cir quality; property; at ordinance requiring a any to keep the portions s railway tracks and two hereof in as good repair e city keeps the balance the duty of the company s of streets between its feet on each side there aves the balance of the he city paves, if the com o, it cannot be said that f the streets in question , or in as good state of uality, as the city keeps ler to meet this obliga ust also pave. State v Co., 10 So. 590, 596, Webster, Dict.

r breach of contract to g fulfillment dependent tions," excusing seller's case of "war, • • • disasters, breakdowns idents at the mines, of cars, interruption of labor agitations or dis of labor supply, or any l the seller's control" s refusal to accept de strikes or other con ich are beyond the con d which cause stoppage of the plant or business losing down of buyer's of business depression tain orders, did not jus o accept deliveries, since " in the phrase "normal ysical conditions affect d not general economic hrase "other contingen business depressions, in generis rule. Cleveland v. Cyclops Steel Co., 123 346.

Cause of injury distinguished

When the last chance doctrine is invoked in aid of a plaintiff, his negligence is admitted, but it is relegated from the position of a "proximate cause" to that of a "remote cause" or mere "condition" and facts must be alleged to bring a plaintiff within protection of the doctrine. Leedom v. Pennsylvania R. Co., Del.Super., 29 A.2d 171, 173.

Anchored ship's position in Hudson river in front of Jersey City Ferry slips, so as unnecessarily to obstruct passage of vessels to and from slips, was a "condition" and not a "cause" of collision between ship and ferryboat during strong flood tide, within meaning of rule that fault must be a cause, not a condition, of a collision, to hold a ship at fault, where master of ferryboat had had no difficulty in reaching the Jersey City terminal on previous runs on flood tide. The Jamestown, D.C.N.Y., 64 F.Supp. 946, 948.

Cause of injury distinguished

Even were it negligent for a ferry passenger to be standing at his horses' heads and not seated in the cabin when the boat violently struck a division piling, it would not bar his recovery for injuries from such collision; not being a proximate cause, but simply a condition. Griffee v. Delaware River Ferry Co., 102 A. 694, 695, 91 N.J.L. 280.

Where one driving along a street after crossing a street car track stopped so near it to converse with a person that there was not room enough for a car to pass, such position constituted a "condition" of the injury, and was not a cause of it. Redford v. Spokane St. Ry. Co., 46 P. 650, 651, 15 Wash. 419.

Where collision occurred while two automobiles were being driven through cloud of smoke that had drifted over highway, smoke was not an "efficient intervening cause" of accident, but was a mere "condition" which jury was entitled to consider in connection with other evidence in determining question of negligence. Anderson v. Byrd, 275 N.W. 825, 826, 133 Neb. 483.

Charge

The use of the word "condition" in charging on contributory negligence and proximate cause may be misleading and hence it is better to avoid its use in a charge and court may advantageously call attention of jury to question whether injury was an

Charge—C d

"extraordinary" as distinguished from a "normal" result of plaintiff's conduct as a circumstance to be considered by jury. Cosgrove v. Shusterman, 26 A.2d 471, 474, 129 Conn. 1.

The word "conditions," as used in Civ. Code, art. 1559, providing for the revocation of donations for nonfulfillment of eventual conditions, is synonymous with the word "charges"; and when a donation contains charges, it is considered as made under the condition that it may be dissolved, or revoked, if they are not executed. Voinche v. Town of Marksville, 50 So. 662, 663, 124 La. 712.

Conditional limitation and limitation distinguished

With respect to the term of a lease, a "limitation" differs from a "condition" in that in order to defeat the estate in the latter case, some act must be done. Airways Supermarkets v. Santone, 83 N.Y.S.2d 881, 883.

Lease provision authorizing landlord on default in payment of rent to terminate lease on five days' written notice to tenant constituted a "condition" and not a "conditional limitation" which would make the lease terminate by mere notice. 98 Delancey St. Corp. v. Barocas, 82 N.Y.S.2d 802, 805.

To terminate a lease in case of a "condition" some act must be done upon the happening of the contingent event, such as making an entry, whereas in case of a "conditional limitation" the mere happening of the event is in itself the limit beyond which the lease no longer exists. 6th Ave. & 24th St. Corp. v. Lyon, 82 N.Y.S.2d 806, 808, 196 Misc. 186.

A provision in lease authorizing landlord to cancel lease on three months' notice in event of a bona fide sale of premises, and not otherwise, is not a "condition". Rankin v. Homestead Golf & Country Club, 37 A.2d 640, 643, 135 N.J.Eq. 160.

A "limitation" marks the utmost time of continuance, while a "condition" marks some event, which, if it takes place in course of that time, will defeat the estate. Storke v. Penn Mut. Life Ins. Co., 61 N.E.2d 552, 555, 390 Ill. 619.

Husband's deed to wife "as long as she remains my wife," was not a "condition," but a valid "limitation," so that when wife died,

Conditional limitation and limitation distinguished—Cont'd

her estate terminated, and title vested in the husband, rather than in the wife's heirs. Charles v. Shortridge, 126 S.W.2d 139, 140, 277 Ky. 183.

A "conditional limitation" is distinguished from an "estate upon condition" in that the estate terminates upon the happening of the event expressed, while in case of an estate upon condition the estate is not defeated until the person who has the right to avail himself of the condition does so by entry. Hess v. Kernen Bros., 149 N.W. 847, 851, 169 Iowa 646.

A limitation marks the period which determines the estate, without any act on the part of who has the next expectant interest. Upon the happening of the contingency prescribed, the estate comes at once to an end, and the subsequent estate arises. The condition determines an estate after breach upon entry or claim by the grantor or his heir or the heirs of the devisor. Fowlkes v. Wagoner, Tenn., 46 S.W. 586, 592.

The difference between a "limitation" and a "condition" is that in the case of a "limitation" the estate determines as soon as the contingency happens without any act on the part of the person next in expectancy, while in the case of a "condition" the estate continues beyond the happening of the contingency unless the grantor or his heirs, or the devisor or his heirs, take advantage of the breach of condition and make an entry or claim in order to avoid the estate. Eastham v. Eastham, 231 S.W. 221, 222, 191 Ky. 617.

Provision of will that trust principal should pass according to donee's will "provided only" that at least half should be given to named beneficiary held to impose "limitation" and not "condition" upon power of donee, so that attempted exercise of power without required appointment to named beneficiary did not alone invalidate attempted exercise of power in its entirety. Old Colony Trust Co. v. Richardson, 7 N.E.2d 432, 434, 297 Mass. 147.

The distinction between an estate upon condition and the limitation by which an estate is determined upon the happening of some event is that in the latter case the estate reverts to the grantor or passes to the person to whom it is granted by limitation over upon the mere happening of the event

Conditional limitation and limitation distinguished—Cont'd

upon which it is limited, without any entry or other act, while in the former the reservation can only be made to the grantor or his heirs, and an entry upon breach of the condition is requisite to revest the estate. The provision for re-entry is therefore the distinctive characteristic of an estate upon condition. Hoselton v. Hoselton, 65 S.W. 1003, 1006, 168 Mo. 182.

In determining whether, in the case of estates greater than estates for years, the language constitutes a "condition" or a "conditional limitation," the rule applied is that, where an estate is so expressly limited by the words of its creation that it cannot endure for any longer time than until the condition happens on which the estate is to fail, this is limitation, but when the estate is expressly granted on condition in deed, the law permits it to endure beyond the time of the contingency happening, unless the grantor takes advantage of the breach of condition, by making entry. Lonas v. Stiver, 195 N.Y.S. 214, 215, 201 App.Div. 862.

Provision of lease that, if tenant continued in default in paying rent or performing covenants for 60 days, lease should terminate at landlord's option, and that landlord might give notice of intention to terminate and thereupon lease should immediately cease, held at most to provide a "condition" authorizing ejectment, and not a "conditional limitation" with right of summary proceeding; service of written notice that landlord has elected to terminate lease for breach of covenant not satisfying requirements of conditional limitation. Norman S. Riesenfeld, Inc., v. R. W. Realty Co., 217 N.Y.S. 306, 311, 127 Misc. 630.

Condition in life

The term "condition," as used in a statute relating to the property of a bankrupt, providing that there should be exempt to the bankrupt the necessary household and kitchen furniture, and such other articles or necessaries as his assignee should designate and set apart, having reference in the amount to the family and "condition" and circumstances of the bankrupt, but altogether not to exceed a certain specified sum, means his position, personal or relative, which he had occupied in life at and previous to his assignment. In re Ludlow, 1 N.Y.Leg.Obs. 322, 323.

Condition precedent

"Conditions," as used in an ordinance relating to corporations supplying natural gas within the limits of a city, declaring that the privileges granted should be enjoyed only on "the following conditions," is used in the sense of regulations, and not conditions precedent. Appeal of City of Pittsburgh, 7 A. 778, 787, 115 Pa. 4.

"Conditions," within the meaning of a statute providing that a railroad desiring to occupy a highway may agree with the public authorities upon the manner, terms, and conditions upon which the same may be used and occupied, has reference to stipulations precedent to the enjoyment of the grant. Cleveland C., C. & St. L. R. Co. v. City of Cincinnati, Ohio, 1 Prob.R. 269, 278.

It seems to be agreed in regard to all conditions, whether in a deed or a will, where the condition is in the nature of a consideration for the concession, its performance will be regarded as intended to precede the vesting of any right, and so a condition precedent. Merrill v. Wisconsin Female College, 43 N.W. 104, 74 Wis. 415, citing 2 Redf. Wills, 283.

By the word "condition" is usually understood some quality annexed to real estate by virtue of which it may be defeated, enlarged, or created upon an uncertain event; also qualities annexed to personal contracts and agreements are frequently called "conditions," and these must be interpreted according to the real intention of the parties. Bac.Abr. "Conditions." The learning in the books relates principally to the former kind. Conditions of the latter class rest upon the same general reasoning with those of the former. "Conditions precedent" are such as must be punctually performed before the estate can vest, but on a "condition subsequent" the estate is immediately executed; yet the continuance of the estate depends upon the breach or performance of the conditions. Selden v. Pringle, N.Y., 17 Barb. 458, 465, citing Bac.Abr.Cond. 1.

Consideration

Recital of twofold consideration, consisting in part of payment of money, and in part of user of property for designated purpose, does not constitute a "condition." Board of Public Education in Wilmington v. St. Patrick's Roman Catholic Church, 136 A. 833, 835, 15 Del.Ch. 286.

Consideration—Cont'd

A will devised land "upon the condition" that the devisee pay to the testator's widow during life a certain sum, which was made a charge upon the land; but no provision was made for a forfeiture of the title, nor was a devise over made in case of default of payment of such charge. Held, that the word "condition" was used in the sense of "consideration," and that the title was not conditional, but merely incumbered with the charge as a lien which might be foreclosed. Ditchey v. Lee, 78 N.E. 972, 974, 167 Ind. 267.

A deed to a corporation chartered "to provide medical attendance and medicines and hospital accommodations" recited that grantor, "for the consideration hereinafter stated," gave, granted, aliened, and confirmed to such corporation, "its successors and assigns forever," the said property, "to have and to hold the said premises under said party of the second part, its successors and assigns forever," and that "this deed is made upon the express condition and for the consideration that the real property hereby conveyed and the income therefrom shall be used by the party of the second part for benevolent purposes and in all respects in compliance with the objects for which said party of the second part is formed," and "it is hereby provided that the hospital to be erected on this land be named the V. Hospital." Held, that the deed did not create a condition subsequent, but that the word "condition" was used with the same idea as "consideration," which was that the real property and the income were to be used for the purposes of compliance with the object of the corporation. Victoria Hospital Ass'n v. All Persons, etc., 147 P. 124, 127, 169 Cal. 455.

Covenant distinguished

Provision in partial assignment of oil and gas lease, that if assignee had not procured approval of the Secretary of Interior within one year after delivery of assignment then assignment should be void, constituted a "condition" and not a "covenant", and upon failure of assignee to secure such consent, all assignee's rights thereunder were forfeited. Shaw v. Guaranty Liquidating Corp., 155 P.2d 53, 54, 67 Cal.App.2d 660.

A grantee's agreement to support grantor, when recited as consideration for a deed, will be treated as a "covenant" rather than a "condition" unless the deed clearly and ex-

Covenant distinguished—Cont'd

plici makes the agreement a condition. Hall v. Barrett, Tex.Civ.App., 126 S.W.2d 1045, 1048.

Whether a direction in the instrument creating a charitable trust arises to the dignity of a "condition" or whether it merely admits of the construction that it is a mere "covenant" depends upon intention of settlor as indicated by the writing. Pennebaker v. Pennebaker Home for Girls, 163 S.W.2d 53, 56, 291 Ky. 12.

Provision of oil and gas lease requiring payment of a specified royalty for wells producing gas not used off the premises was a "covenant", the breach of which would subject lessees to a suit for damages and not a "condition" breach of which would entitle lessors to cancellation of the lease. Freeman v. Magnolia Petroleum Co., Tex.Civ.App., 165 S.W.2d 111, 115, 116.

A provision of offer of Public Works Administration to make loan and grant for construction of municipal power and light plant that no obligation would be assumed by government unless administrator was satisfied that city had been unable to acquire property of private company operating in city under nonexclusive franchise, after reasonable efforts made in good faith, was not a "covenant" in a contract, but a "condition" of the offer by which city would not be bound if it elected to reject offer, and which could be performed, modified, or waived before contract was made. Southwestern Gas & Electric Co. v. City of Texarkana, C.C.A.Tex., 104 F.2d 847, 849.

"Covenants" differ from "conditions," in that breach of covenant merely gives right to maintain personal action and breach of condition works forfeiture. Bartell v. Senger, 155 A. 174, 176, 160 Md. 685.

The term "negative covenant," and not the word "condition," is correctly used to designate a provision in a deed that the premises thereby conveyed are not to be used for saloon purposes. Star Brewery Co. v. Primas, 45 N.E. 145, 147, 163 Ill. 652.

A covenant differs from a condition, in that in a proper case a court of chancery may enforce specific performance of the former, while it will not of the latter, for the reason that to do so would work a forfeiture of the estate; a court of equity not lending its aid to enforce a forfeiture. Northwestern Uni-

Covenant distinguished—Cont'd

versity v. esley Memorial Hospital, 128 N. E. 13, 18, 290 Ill. 205.

A "condition" is a qualification annexed to an estate by the grantor, whereby it may be enlarged, defeated, or created on an uncertain event, and it differs from "covenant" in this: that a condition is in the words of and binding on both parties, while a covenant is in the words of the covenantor only. Langley v. Ross, 20 N.W. 886, 887, 53 Mich. 163.

Clause in contract for sale of standing timber, allowing extension of time for cutting, "provided that grantee agrees to make reasonable efforts to cut and remove said timber within said five-year period," held "covenant," which is promise of only one party, rather than "condition" which binds both parties. Murphy v. Schuster Springs Lumber Co., 111 So. 427, 430, 215 Ala. 412.

The difference between a "covenant" and a "condition" in a contract relates largely to the remedy, and, if the breach of the agreement pertains to the validity of the instrument, or is a ground for forfeiture, it is a condition, while, if the remedy for a breach is merely an action at law for damages, the agreement is a covenant. Cavanagh v. Iowa Beer Co., 113 N.W. 856, 858, 136 Iowa, 279.

"A 'condition' differs from a 'covenant' in that the legal responsibility of nonfulfillment of a covenant is that the party violating it must respond in damages, while the consequence of the nonfulfillment of a condition is a forfeiture of the estate. If it be doubtful whether a clause in a deed be a covenant or a condition, the courts will decide against the latter construction." Woodruff v. Woodruff, 16 A. 4, 7, 44 N.J.Eq. (17 Stew.) 349, 1 L.R.A. 380.

Provision in life policy requiring that insured be alive and in sound health at date of insurance held "condition" and not "covenant," and operated more strongly for insurer than covenant that answers in application were deemed warranties. Youngblood v. Prudential Ins. Co. of America, 165 A. 667, 668, 109 Pa.Super. 20.

A "condition" in a deed is something reserved in it for the benefit of the grantor empowering him on default of performance to destroy the grantee's estate and revest it in himself or his heirs, while a "covenant" is an agreement or consent of two or more by deed

Covenant distinguished—Cont'd

in writing sealed and delivered, whereby either one promises to the other that something is done or will be done in the future. Perkins v. Kirby, 85 A. 648, 651, 35 R.I. 84.

An agreement in a lease to give a chattel mortgage on personalty as security for future payments of rent is a "condition," which as a mutual agreement is binding on both parties, and a breach of which will work a forfeiture of the estate, rather than a "covenant," which binds only the covenantor, and whose breach only warrants the recovery of damages. Knight v. Black, 126 P. 512, 514, 19 Cal.App. 518.

Standard mortgagee clause in fire policy providing that mortgagee should on demand pay premium if mortgagor failed to do so held not "covenant" but "condition" which if not complied with by mortgagee precluded his recovery from insurer, and hence insurer could not recover unpaid premiums from mortgagee. Insurance Law, § 121. St. Lawrence County Farmers Ins. Co. v. Thompson, 270 N.Y.S. 898, 150 Misc. 532.

Clause in deed requiring grantee to erect dwelling within three years held to be covenant not authorizing re-entry rather than "condition," since "condition" is not for benefit of other land, and its benefit does not run with land, but it is right reserved to grantor which he and his heirs alone can enforce, and is not an estate nor interest in real property nor assignable chose in action. Carruthers v. Spaulding, 275 N.Y.S. 37, 39, 242 App.Div. 412.

Where mortgage clause contains only an agreement by mortgagee to give notice of any change of ownership that may come to his knowledge, agreement is a "covenant" for breach of which action for damages will lie, and not a "condition" breach of which will defeat recovery on fire policy. Phœnix Mut. Life Ins. Co. for Use of First Nat. Bank v. Ætna Ins. Co., 59 S.W.2d 517, 519, 166 Tenn. 126.

Provision in New York standard mortgagee clause in fire policy that mortgagee shall, on demand, pay premium is a "condition" and not a "covenant," so that insurer cannot sue mortgagee for recovery of unpaid premium, but on mortgagee's failure, on demand, to pay premium, insurer acquires vested right to cancel policy. Prudential Ins. Co. of America v. Franklin Fire Ins.

Covenant distinguished—Cont'd

Co. of Philadelphia, 185 S.E. 537, 538, 180 S.C. 250.

A mining lease under seal, stipulating that the lessee will explore the land and mine in a big way and pay a minimum royalty whether ore is mined or not, binds the lessee by covenant to explore and mine the property, and does not create a condition on which his right may continue or be defeated, for a "covenant" is a promise under seal to do or not to do a particular thing, while the office of a "condition" is generally to indicate the terms on which a certain right will arise or continue or be defeated. De Grasse v. Verona Mining Co., 152 N.W. 242, 246, 185 Mich. 514.

A "condition" as known in the law of realty is a qualification or restriction annexed to a conveyance of lands, whereby it is provided that, in case a particular event does not happen, or in case the grantor or grantee does, or omits to do, a particular act, an estate shall commence, be enlarged, or defeated. Where intention of parties to deed clearly shows that enjoyment of estate created by deed was intended to depend upon performance of agreement therein, agreement is a "condition" and not a "covenant," notwithstanding conditions are not favored. New Edgewood Lake Corporation v. Kingston Trust Co., 285 N.Y.S. 130, 134, 246 App.Div. 163.

A condition is a qualification or restriction annexed to a deed or devise, by means of which an estate is made, possessed, or to be enlarged or to be defeated upon the happening or not happening of a particular event, or the performance or nonperformance of a particular act. Words declaratory of the consideration for, and the purpose for, and the purpose of the conveyance and the limitation of, the use of the property, or which direct or prohibit the performance of a particular act, do not of themselves render an estate conditional. The same words may be employed to create a covenant as to create a condition, and, if there is any doubt regarding the intention of the grantor or devisor, courts will incline toward the former construction, for conditions which destroy estates are not favored and are strictly considered. A condition is always the creation of the grantor or devisor. A covenant may be made either by a grantor or the grantee. Detroit Union R. R. Depot & Station Co. v.

Cove . distinguished—Cont'd

Fort Street Union Depot Co., 87 N.W. 214, 216, 128 Mich. 184.

Plaintiff conveyed a strip of land for a railroad right of way on "condition" that the grantee "shall construct and maintain a * * * railroad to be operated by electricity for motive power, * * * and upon the failure or abandonment of said enterprise by the grantee * * * the privileges herein and the property hereby conveyed shall revert to and be fully vested in the grantors, * * * and conditioned also that the construction of such road be fully completed and such road be in operation in or before the year 1900." Held, that the clause requiring the road to be finished before or during the year 1900 was a "covenant" and not a "condition," and a failure to complete the road within that time did not operate as a forfeiture of the right of way. Krueger v. St. Louis, St. C. & W. R. Co., 84 S.W. 898, 901, 185 Mo. 227, citing Ellis v. Kyger, 3 S.W. 23, 90 Mo. 600; O'Brien v. Wagner, 7 S.W. 19, 94 Mo. 93, 4 Am.St.Rep. 362; Morrill v. Wabash, St. L. & P. Ry. Co., 9 S.W. 657, 96 Mo. 174; Studdard v. Wells, 25 S.W. 201, 120 Mo. 25; Roberts v. Crume, 73 S.W. 662, 173 Mo. loc. cit. 581; Gratz v. Highland Scenic R. Co., 65 S.W. 223, 165 Mo. 211.

See Covenant. Guerin v. Blair, Cal.App., 196 P.2d 651, 653, Subsequent opinion 204 P. 2d 884, 33 Cal.2d 744.

Creation and construction

"A condition is a qualification or restriction annexed to a conveyance. The words must not only be such as of themselves import a condition, but must be so connected with the grant in the deed as to qualify or restrain it." Laberee v. Carleton, 53 Me. 211, 213.

A condition in a deed, such as will work a forfeiture of the estate if not performed, is not favored in the law, and will not be implied. It will only be enforced where the language of the instrument containing it unmistakably imposes an estate on condition. Hamilton v. Kneeland, 1 Nev. 40, 53.

A devisee, accepting a devise, takes it subject to a condition therein stated; a condition meaning any qualification, restriction, or limitation annexed to the gift, and modifying or destroying conditionally its full en-

Creation and construction—Cont'd

joyment and disposal. In re Conway's Estate, 198 N.Y.S. 351, 120 Misc. 287.

Conditional estates are either estates upon condition in deed or upon conditions in law, the simplest form of an estate on condition in deed being where a grantor conveys the fee reserving a certain rent on condition that if it is not paid he or his heirs may re-enter. Sheets v. Vandalia R. Co., 127 N.E. 609, 610, 74 Ind.App. 597.

Where a note provided for attorney's fees if not paid promptly, the provision, "if not paid promptly," is not a "condition," within Burns' Ann.St.1914, § 9089, providing that all agreements to pay attorney's fees depending upon any condition set forth in any note, are illegal; the provision amounting to no more than providing for attorney's fees if the note was not paid at maturity. Easley v. Deer, 121 N.E. 542, 544, 65 Ind. App. 264.

No precise form of words is necessary in order to create a condition in a will, but, whenever it clearly appears that it was the testator's intention to make a condition, that condition will be carried into effect. Thus a legacy directed to be paid at the end of two years, provided that the legatee shall be deemed to be a reformed man in the judgment of the executors, is a conditional legacy. Markham v. Hufford, 82 N.W. 222, 223, 123 Mich. 505, 48 L.R.A. 580, 81 Am.St.Rep. 222.

The term "condition" in a conveyance to a church, on the express condition and limitation that it should not be sold, mortgaged or in any way conveyed, or any buildings kept, maintained, or erected thereon except for the purposes of the church, was held, in view of the fact, to receive a liberal construction for the benefit of the grantees, and not a construction tending to defeat the conveyance. Mills v. Davidson, 35 A. 1072, 1074, 54 N.J.Eq. 659, 35 L.R.A. 113, 55 Am. St.Rep. 594.

A condition may be created by express words, which is called a "condition in fact," as where a feoffment is made on land reserved, rent payable on a certain date, on "condition" that if not paid on the day the feoffer may re-enter. The law inclines to construe conditions as subsequent rather than precedent, and to be remedied by damages rather than by forfeiture. "Conditions subsequent," says Chancellor Kent, "are to

Creation and construction—Cont'd

be construed strictly, because they tend to destroy estates." Thornton v. Trammell, 39 Ga. 202, 207.

Under a mortgage in the form set out in St.1912, c. 502, § 6, further providing that, in case any default in condition should exist for more than 30 days, the entire mortgage debt should become due at the option of the holder, the word "condition" was applicable to the "statutory condition" requiring prompt payment of taxes; the parties having intended to include the additional agreement making the entire debt due in case of any default within the scope of the statutory condition. American House Hotel Co. v. Hemenway, 129 N.E. 371, 372, 237 Mass. 180.

Testator by his will gave certain estate to trustees to hold for the sole benefit of his grandchildren for three years, and at the expiration of that time to transfer the property to such grandchildren, adding, "If either of said children die before the trust ceases his or her legal heirs shall be substituted in place of the deceased in every respect." A granddaughter died within the three years, leaving a will by which she in terms gave her share of the property to her husband and others. The words of the will clearly enough created a conditional devise only. No particular set of technical words is necessary to create a condition; a common-sense construction of the words governs. The expressive word "if" is quite commonly employed to express a condition. The words "shall be substituted" have an unmistakable meaning in their place. It would be a perversion of the common meaning of common words to deny the testator's intention to create a conditional devise, and the happening of the subsequent condition defeats the precedent estate. Although a vested estate, therefore, nothing passed by her will. The husband of the devisee cannot be considered one of her legal heirs in the sense of the term as used in the devise over to "legal heirs." Buck v. Paine, 75 Me. 582, 588.

Defeasance

The words "condition", "defeasance", and "forfeiture" as applied to land, give rise to the same result, namely, that because thereof the person loses some right, title, interest or estate with which he was otherwise vested, but respecting the manner by which that re-

Defeasance—Cont'd

sult is reached, as well as procedurally, the words are distinct. Sturm v. Crowley, 48 S.E.2d 350, 352, 353, 131 W.Va. 505.

The words "condition", "defeasance" are similar in meaning and operate to defeat the force or operation of some deed or estate. Sturm v. Crowley, 48 S.E.2d 350, 352, 353, 131 W.Va. 505.

An instrument which defeats the force or operation of some other deed or of an estate is a "defeasance"; but, if the provision is in the same deed, it is a "condition." Epperson v. Epperson, 62 S.E. 344, 345, 108 Va. 471.

Where the conveyance of standing timber provided that the grantee should have and hold title thereto upon the "condition" and providing it was cut and removed from the land on or before a certain date, the estate was subject to defeasance on failure to cut the timber on such date. H. H. Hitt Lumber Co. v. Cullman Coal & Coke Co., 76 So. 347, 348, 200 Ala. 415.

Bouvier in his Law Dictionary defines "defeasance," as applied to contracts, to be an instrument which defeats the force or operation of some other deed or of an estate. That which is in the same deed is called a "condition"; and that which is in another deed is a "defeasance." Simmons v. West Virginia Ins. Co., 8 W.Va. 474, 486, citing Bouv.Law.Dict.

In a lease of premises to be used for hotel, saloon, and bathing purposes, which provides that, if the lessee shall use the premises contrary to the conditions therein contained, the lessor might re-enter, the continued use of the premises for saloon purposes is not a "condition," that being defined as a clause of contingency on the happening of which the estate may be defeated, and the lessor cannot re-enter for a breach thereof. Henry Rahr's Sons Co. v. Buckley, 150 N.W. 994, 995, 159 Wis. 589.

Directions

Courts will be reluctant to construe directions in an instrument creating a charitable trust as "conditions" unless such construction is manifestly appropriate. Pennebaker v. Pennebaker Home for Girls, 163 S.W.2d 53, 56, 291 Ky. 12.

If property is conveyed in trust for a charitable purpose, the mere fact that there

Dir ns—Cont'd

is a direction in instrument of conveyance that property shall be used forever for such purpose, or that it shall be used for such purpose only, does not create a "condition". Pennebaker v. Pennebaker Home for Girls, 163 S.W.2d 53, 56, 291 Ky. 12.

A court will give that construction to the instrument creating a charitable trust which, from words used by donor in creating trust, it conceives to have been the intention of donor, and, if by determining from a fair construction of the writing that it was donor's intention that in all events the property was to be maintained for a charitable purpose, and that the manner of carrying out that purpose which is expressed in instrument was not the paramount object of trust, such directions will be construed to not be a "condition" for breach of which a reverter will occur. Pennebaker v. Pennebaker Home for Girls, 163 S.W.2d 53, 56, 291 Ky. 12.

Environment of premises

"Condition," as used in an insurance policy providing that the company shall not be liable if there be any omissions, misrepresentations, nondisclosure, or concealment of the condition of the premises, means more than location; it means location and environment. Fromhers v. Yankton Fire Ins. Co., 63 N.W. 784, 786, 7 S.D. 187.

Essential part of contract

The terms of a contract comprise "undertakings", which create obligations, and "conditions", which are contingencies on which the contract itself, or any particular obligation created by it, is to depend. General Am. Life Ins. Co. v. Armstrong, 185 S.W.2d 505, 507, 508, 182 Tenn. 181.

A provision in life policy that obligation to pay double indemnity for accidental death shall be void if total and permanent disability benefits are allowed was a "condition" rather than an "undertaking", and hence was not void as repugnant to unqualified undertaking to pay double indemnity. General Am. Life Ins. Co. v. Armstrong, 185 S.W.2d 505, 507, 508, 182 Tenn. 181.

"Condition" is created by mutual agreement of parties to conveyance, and is binding upon both. Moe v. Gier, 2 P.2d 852, 855, 116 Cal.App. 408.

Essenti rt of contract—Cont'd

In ... proper sense, the word "condition" in the law of contracts means ... operative fact subsequent to acceptance and prior to discharge, a fact on which the rights and duties of the parties depend; such a fact may be an act of one of the two contracting parties or the act of a third party, or any other fact. It is not necessary to constitute a "condition" that it be expressed in such. In re Oefein's Estate, 247 N.W. 108, 111, 209 Wis. 386.

In Franklin Fire Ins. Co. v. Chicago Ins. Co., 36 Md. 102, 11 Am.Rep. 469, the decision turned upon the meaning of the word "conditions" in a fire policy, and the court, following the suggestions in Blake v. Exchange Mut. Ins. Co., 78 Mass. (12 Gray) 265, confined it to those provisions of the policy which entered into and formed a part of the contract of insurance, and are essential to make it a binding contract between parties and which are properly designated as "conditions." Dwelling-House Ins. Co. v. Snyder, 34 A. 931, 932, 50 N.J.L. 18.

In its more extended sense, the word "condition" signifies a clause in a contract or agreement which has for its object the suspension, rescission, or modification of the principal obligation, or, in case of a will, to suspend, revoke, or modify the devise or bequest. Towle v. Remsen, 70 N.Y. 303, 307; Elyton Land Co. v. South & North Alabama R. Co., Ala., 14 So. 297, 298.

Code Civ.Proc. § 1187, providing that a claim of lien by an original contractor must contain a statement of his demand, less credits, the name of the owner, the name of the person by whom he was employed, a statement of the terms, time given, and conditions of the contract, and a description of the property to be charged with the lien, does not require that a claim of lien, to be valid, should set forth that the demand was based on more than one contract, and then segregate and separately state the amount of each, though the evidence in support of the lien showed that the work was performed on separate and distinct structures under separate and distinct contracts; the word "conditions" referring only to those provisions which enter into and form a part of the contract and are essential to make it binding. Acme Lumber Co. v. Wessling, 129 P. 167, 170, 19 Cal.App. 406.

Event or contingency

"Condition" denotes a future and uncertain event upon the happening of which is made to depend the existence of an obligation, or that which subordinates the existence of liability under a contract to a certain future event. Standard Surety & Casualty Co. v. Wynn, Tex.Civ.App., 172 S.W.2d 780, ref.

A "condition," as applied to a bond, is the expression of an event or contingency, upon the happening of which the obligation attaches. Ferguson v. Ferguson, Tex.Civ. App., 69 S.W.2d 592, 595.

"A 'condition' is a future and uncertain event upon which is made to depend the existence of a juridical tie or obligation, or rather it is a kind of restriction which subordinates the existence of a juridical relation to a future and uncertain event." Barber Asphalt Paving Co. v. St. Louis Cypress Co., 46 So. 193, 197, 121 La. 152, quoted and adopted from Dalloz Code Annoté Nouveau Code Civil, 111, p. 2, No. 27.

Depositors' guaranty law, Vernon's Ann. Civ.St. art. 447 note, providing "that deposits upon which interest is being paid or contracted to be paid, directly or indirectly * * * shall not be insured, * * *" held not to exclude a deposit which was to bear interest if left 12 months, but which depositor unsuccessfully attempted to withdraw before that time, and which had been in bank less than 12 months when it failed, "indirectly" signifying doing by obscure or circuitous means that which is prohibited from being done directly, a thing not done in direct or open manner, including all modes of doing prohibited act other than by direct method; "contingent" presaging the existence of a tentative liability which will become absolute on happening of certain event, and comprehending a liability depending on some uncertain future event, while "condition" denotes a future and uncertain event on the happening of which is made to depend the existence of an obligation, or which subordinates the existence of liability on contract to a future and uncertain event, and "if" being always expressive of a condition. Farmers' State Bank v. Mincher, Tex., 267 S.W. 996, 1001.

Franchise tax

The franchise tax imposed on corporations is not a "condition" or "qualification" to doing business. Hollingsworth & Whitney Co. v. State, 1 So.2d 387, 388, 241 Ala. 96.

Limitation of risk or liability

Automobile liability policy provision excluding garage operator from coverage was not a "condition". Mancini v. Thomas, 34 A.2d 106, 110, 113 Vt. 322.

On the question of effect of incontestability clause on suicide clause in policy, there can be no distinction in law or in reason between provision that upon certain conditions one-fifth only of face of life policy shall be payable, and provision that upon certain conditions the promise of the policy to pay face amount shall be void and premiums paid shall be returned, but in either case there is a "limitation of the liability" of insurer, not a "warranty" or "condition" upon breach of which liability assumed may be forfeited. New England Mut. Life Ins. Co. v. Mitchell, C.C.A.Va., 118 F.2d 414, 419.

The word "conditions," at least in American insurance parlance, is generally understood to mean more particularly the printed conditions on the inside of the policy which serve generally as a limitation of risk or of liability or impose various conditions requiring compliance by the insured. Federal Intermediate Credit Bank of Baltimore v. Globe & Rutgers Fire Ins. Co., D.C.Md., 7 F.Supp. 56, 68.

Occasion synonymous

Trial court's statement, that defendant's negligent act was the "occasion" rather than cause of plaintiff's injury, meant no more than that it was not a "proximate cause" of such occurrence; "occasion" being the equivalent of the term "condition". Edgecomb v. Great Atlantic & Pacific Tea Co., 18 A.2d 364, 365, 127 Conn. 488.

Person

Where insured did not have any medical knowledge and did not know at time of application or before issuance of life policy that he had cancer of stomach, insured's statement in good faith in application for policy that he had never had any ailment or disease of the stomach was a "representation" and not "warranty" or "condition", and hence under statute the policy was not subject to rescission because of such false statement. Metropolitan Life Ins. Co. v. Burno, 33 N.E.2d 519, 521, 309 Mass. 7.

Word "condition" within provision in insurance application warranting that applicant was in whole and sound condition means

Person—Cont'd

state or situation as regards internal or external circumstance or plight. Clark v. Commercial Casualty Ins. Co., 148 S.E. 319, 320, 107 W.Va. 380.

A warranty in an insurance application that applicant was in whole and sound condition, mentally and physically, is not breached by failure to state that he had a leg amputated at the knee, since "whole" means hale, hearty, strong, sound, and also entire, complete, and "sound" means hearty, not diseased, and also whole, unimpaired, and "condition" means state or situation as regards internal or external circumstance or plight, and that construction most favorable to assured will be taken. Great Eastern Casualty Co. v. Smith, Tex., 174 S.W. 687.

In prosecution for committing lewd act on 11 year old girl, exclusion of question asked accused's wife as to condition and demeanor of such girl and another girl after certain trip held prejudicial error. Pen. Code, § 288. Exclusion of such question was error because defendant was entitled to inquire into physical appearance or apparent mental attitude of girls on their return from trip when alleged offenses were committed, and inquiry as to "condition" of one girl and 'demeanor" of both related to physical appearance. People v. Vaughan, 21 P.2d 438, 131 Cal.App. 265.

In an action for physical pain, and for shame, humiliation, and suffering caused the plaintiff's wife from a conductor's abusive language to her, no element of the damages sued for was ignored by an instruction that the burden is upon the plaintiff to show by a preponderance of the evidence that she was injured and is suffering as alleged in the pleadings, and that "her said condition or her said injury and suffering are the direct and proximate result of the misconduct on the part of the defendant's conductor," and that if the jury should believe, by a preponderance of the evidence, that her "condition" resulted from some misconduct on the part of the conductor they should return a verdict in favor of defendant; the word "condition," as last used, in view of the other quoted phrases, comprehending every element of damage claimed in the petition, and clearly having reference to both her physical and mental condition. Carpenter v. Trinity & B. V. Ry. Co., Tex.Civ.App., 146 S.W. 363, 368.

Provisions

Provision in lease that if tenant defaulted in performance of any provisions therein and remained in default for 15 days after notice, then at the option of landlord, lease would terminate, in which event landlord could reenter and remove all persons from premises and that in such case tenant waived notice of landlord's intention to reenter, was a "condition" and on default of tenant, landlord's only remedy would be ejectment. Hayman v. Butler Bros., 82 N.Y.S.2d 148, 150, 196 Misc. 641.

Provision of sale contract for delivery of goods within reasonable time is "condition," which may be waived and, if waived, can not be reimposed without notice, but, if not waived, buyer may abrogate contract after expiration of such time without delivery. Readex Microprint Corp. v. General Aniline & Film Corp., 74 N.Y.S.2d 613, 618.

Generally, provisions in statutes authorizing actions for wrongful death which limit the time within which the actions shall be brought are "conditions" that must be strictly complied with. Peters v. Public Service Corporation, 29 A.2d 189, 194, 132 N.J.Eq. 500.

Provision that lease should terminate if no gas was being produced from the premises upon termination of the primary term, and that a gas well from which gas was not being sold or used off the premises was a producing well provided a specified royalty was paid, was a "condition". Freeman v. Magnolia Petroleum Co., 171 S.W.2d 339, 342, 141 Tex. 274.

Provision of accident and health policy that insurance shall not cover any person under age of 16 years or over age of 65 years constitutes a "condition" or "limitation" for benefit of insurer and not for benefit of insured, and is subject to waiver by insurer. Lipe v. World Ins. Co., 5 N.W.2d 93, 98, 142 Neb. 22.

In the absence of estoppel, waiver or other excuse, co-operation by the insured in accordance with the provisions of an automobile liability policy is a "condition" the breach of which ends insurer's obligation. Curran v. Connecticut Indemnity Co., 20 A.2d 87, 89, 127 Conn. 692.

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such gas well from which gas is not used off the premises and "while so paid" the well should be a "producing well" within provision that lease should remain in force as long as gas was produced from the land, were required to be construed with provision authorizing surrender of the lease, and extended the surrender privilege regardless of the royalty agreement and did not mean that such gas well could not be a producing well, if there should be a period of time after the primary term in which royalty was not paid, so as to make such provision a "condition." Freeman v. Magnolia Petroleum Co., Tex.Civ.App., 165 S.W.2d 111, 115, 116.

The term for which the accident policy was to run was one of the "conditions and provisions," within a clause to the effect that no "condition or provision" should be waived or altered by any one, unless by written consent of an officer of the company. Wheeler v. United States Casualty Co., 59 A. 347, 348, 71 N.J.L. 396.

Though words "provisions" and "conditions" may overlap in meaning in some contexts, as applied to contracts, "provisions" has the more general and "conditions" the more particular meaning. Equitable Life Assur. Soc. of United States v. Deem, C.C.A.W.Va., 91 F.2d 569, 573.

Standard mortgage clause which provides that failure to give notice of change of ownership will render fire policy void creates "condition" which, if breached, will defeat recovery on policy. Phoenix Mut. Life Ins. Co. v. Ætna Ins. Co., 59 S.W.2d 517, 519, 166 Tenn. 126.

The "provisions" of life policy relating to disability benefits include particular "conditions" on which such benefits become payable, but "provisions" affirmatively creating insurer's liability are not equivalent to "conditions," which limit and restrict such liability. Equitable Life Assur. Soc. of United States v. Deem, C.C.A.W.Va., 91 F.2d 569, 573.

The word "provision," as used in a policy insuring one subject to the "provisions, conditions, definitions and limits herein," indicates nothing technical, but is a general term which may include either a promise or undertaking of some kind or a condition. Blackman v. United States Casualty Co., 103 S.W. 784, 786, 117 Tenn. 578.

Provisions —Cont'd

Under statute requiring "exceptions" to policy to be printed with same prominence as benefits to which they apply, insurer could not rely on provision of life and accident policy specifying that indemnity should be paid only when death occurred within thirty days after accident, where provision conferring benefits was printed in bolder type, since such provision was not a "condition" but was an "exception." Smith-Hurd Stats. c. 73, § 363. Mowery v. Washington Nat. Ins. Co., 7 N.E.2d 334, 336, 289 Ill.App. 443.

Testatrix bequeathed the income of $30,000 to her niece for life, and, after her death, to her children, if any, absolutely, but, if she died without issue, the principal to go to two brothers named, the interest only for their use and to their children, lawful issue, absolutely. The will also contained a clause bequeathing the residue to the niece, subject to the same conditions as the legacy, the interest to be used for her benefit for life, the principal to go to her children, lawful issue, absolutely, but, if she died unmarried, she should have the power to devise it to whichever of her brothers she considered most worthy to inherit, the interest only to go to them, the principal to their children. The niece died without issue and without having exercised the power of appointment. Held, that the principal of the residue passed to the children, lawful issue, of the two brothers who took the $30,000 legacy absolutely; the word "conditions," as used in the residuary clause, being construed to mean the same as "provisions" under which the niece took the pecuniary legacy. In re Keene's Estate, 70 A. 706, 710, 221 Pa. 201.

Qualification synonymous

"Condition" is qualification annexed to estate by grantor upon happening of which estate granted is enlarged or defeated. Moe v. Gier, 2 P.2d 852, 855, 116 Cal.App. 403.

"Condition, in its legal signification, means something annexed to a grant." State v. Board of Public Works, 42 Ohio St. 607, 615.

A "condition" is a qualification annexed to an estate by the grantor upon the happening or breach of which the estate granted is enlarged or defeated. Anderson v. Palladine, 178 P. 553, 554, 39 Cal.App. 256.

A "condition" in a deed is a qualification of the estate granted, and may be either pre-

Qualification synonymous—Cont'd

cedent or subsequent. Nowak v. Dombrowski, 107 N.E. 807, 808, 267 Ill. 103.

"Conditions" are qualifications annexed by the lessor, whereby the estate granted may be enlarged, diminished, created, or defeated on the happening of some contingent event. Williams v. Notopolos, 103 A. 290, 291, 259 Pa. 469.

A condition is a qualification annexed to an estate on the happening of which the estate is enlarged or defeated, and it is created by mutual agreement of the parties and is binding on both so that breach of condition works forfeiture of estate. Joyce v. Krupp, 257 P. 124, 127, 83 Cal.App. 391.

A "condition" in the law of realty is a qualification or restriction annexed to a conveyance, providing that if an event does or does not happen, or the grantor or grantee does or omits to do a particular act, an estate shall commence, be enlarged, or defeated. Munro v. Syracuse, L. S. & N. R. Co., 93 N.E. 516, 518, 200 N.Y. 224, 21 Ann.Cas. 594.

A sublease, providing that it was made subject to conditions of original lease, which gave lessor option to terminate, did not incorporate provision of original lease for payment of all loss and damage; as a "condition" means a qualification or restriction annexed to a conveyance providing that in certain event an estate shall commence, be enlarged or defeated. Pedro v. Potter, 242 P. 926, 929, 197 Cal. 731, 42 A.L.R. 1165.

Supreme Court had no jurisdiction, since Code 1930, § 7-501, imposes upon right of appeal to Supreme Court, in actions for damages or money only, condition that amount in controversy shall exceed $250, and section 8-103 accords right of appeal from circuit court to Supreme Court in special statutory proceeding under "same conditions" as from judgment entered in action at law, a "condition" ordinarily being any qualification, restriction, or limitation modifying or destroying the full enjoyment or use of a right. Weir v. Marriott, 295 P. 449, 450, 135 Or. 214.

"Performing a condition" is doing of some act which is required to be done preliminary to vesting of some right or estate or obtaining of some benefit; "condition" is variously defined as a qualification, restriction, or limitation modifying or destroying the original act with which it is connected;

Qualification synonymous—Cont'd

a clause in a contract or agreement which has for its object to suspend, rescind, or modify the principal obligation, or in a case of a will, to suspend, revoke, or modify the devise or bequest; an event, fact, or the like that is necessary to the occurrence of some other, though not its cause; a prerequisite. White v. Harby, 179 S.E. 671, 178 S.C. 36.

"A condition is a qualification or restriction annexed to a conveyance of lands, whereby it is provided that in case a particular event does or does not happen, or in case the grantor or grantees do or omit to do a particular act, an estate shall commence, be enlarged, or be defeated." Heaston v. Randolph County Com'rs, 20 Ind. 396, 404; Johnson v. Gurley, 52 Tex. 222, 226; Thornton v. Trammell, 39 Ga. 202, 207; Laughley v. Ross, 20 N.W. 886, 887, 55 Mich. 164; Blanchard v. Detroit, L. & L. M. R. Co., 31 Mich. 43, 49, 18 Am.Rep. 142; Michigan State Bank v. Hastings, Mich., 1 Doug. 224, 232, 41 Am.Dec. 549; Campau v. Chene, 1 Mich. (Man.) 400, 413; Detroit Union R. Depot & Station Co. v. Fort Street Union Depot Co., 87 N.W. 214, 216, 128 Mich. 184; Warner v. Bennett, 31 Conn. 468, 475; Fowlkes v. Wagoner, Tenn., 46 S.W. 586, 591; Williamson v. Gordon Heights Ry. Co., Ind., 40 A. 933, 934; Smith v. White, 5 Neb. 402, 407; Rogan v. Walker, 1 Wis. 527, 554; Raley v. Umatilla County, 13 P. 890, 894, 15 Or. 172, 3 Am.St.Rep. 142. The condition which is to affect the estate may be express or implied, and it may be precedent or subsequent. Raley v. Umatilla County, 13 P. 890, 894, 15 Or. 172, 3 Am.St.Rep. 142; Michigan State Bank v. Hastings, Mich., 1 Doug. 224, 232, 41 Am.Dec. 549, citing Litt. § 325. "The condition is annexed to the estate; it doth always attend and wait upon the estate it is knit to it." If it would not be competent for an individual to separate an estate from the condition annexed to it, it would not be competent for the state to do it. Michigan State Bank v. Hastings, Mich., 1 Doug. 224, 206, 41 Am.Dec. 549. A condition must be reserved by words used by the grantor, but it is not necessarily confined to the covenants of the deed. So where the recital of a deed was not a mere recital of past circumstances but a declaration of present intention and a part of the original contract of the parties, and declared that the conveyance was "on this condition"—that is, that the grantee

Qualification synonymous—Cont'd

should discharge a certain ground rent, and also build a house on such land for the use of the grantor—the condition was effectually reserved, in addition to the security afforded by covenants in other parts of the deed. Hamilton v. Elliott, Pa., 5 Serg. & R. 375, 381.

Quality

A "condition" is a quality annexed to land whereby an estate may be divided. Littlejohn v. Egerton, 77 N.C. 379, 384.

Regulations distinguished

Const. art. 11, § 19, as amended in 1911, see Laws 1911, p. 2180, authorizing any municipal corporation to establish and operate enumerated public utilities, and providing that persons or corporations may establish and operate such works under "such conditions and under such regulations as the municipality may prescribe under its organic law, on condition that the municipal government shall have the right to regulate the charges thereof," grants to all municipalities the power to construct and operate public utilities, and to prescribe the conditions on which persons and corporations may establish and operate such works, subject to charter provisions; and an ordinance of a city empowered to regulate conduits and works for the production and distribution of gas, etc., which prohibits excavations in streets without first obtaining permission from the board of public works, is valid when applied to one engaged in laying a gas pipe in a street as a part of the distributing system of a corporation engaged in supplying gas to the inhabitants of the city; the word "condition" meaning something established as a requisite to the doing or taking effect of something else, while the word "regulations" is something distinct from the word "conditions," and implies a broader meaning in the latter word than mere regulation of the manner of use. Ex parte Russell, 126 P. 875, 876, 163 Cal. 668.

Restraint on alienation distinguished

"Condition" in deed refers to case where on breach of restraint land is forfeited to grantor or his heirs on entry, and is distinguished from mere restraint on alienation. White v. White, 150 S.E. 531, 533, 108 W.Va. 125, 66 A.L.R. 518.

Restriction

"Statutes of limitation" in a strict sense, are statutes of repose, and are such legislative enactments as prescribe the periods within which actions may be brought upon certain claims or within which certain rights may be enforced, but statutes which merely restrict a statutory or other right are in the nature of "conditions" put by the law upon the right given. Ritter v. Franklin, 123 P.2d 866, 869, 50 Cal.App.2d 844.

A "condition" is a qualification or restriction annexed to a conveyance, and so united with it in the deed as to qualify it or restrain it. Cooper v. Green, 28 Ark. 48, 54.

A "condition" is any qualification, restriction, or limitation annexed to a gift, and modifying or destroying its full enjoyment. Adams v. Johnson, 76 A. 174, 227 Pa. 454.

A provision in a will that real estate which had therein been devised in fee should not be sold or alienated by the devisees for a certain number of years is properly a restriction, though called in the will a "condition." Fowler v. Duhme, 42 N.E. 623, 633, 143 Ind. 248.

The words "and these presents are upon this condition," namely, that the lessee shall suffer the lessor to enjoy a way reserved through the demised premises without obstruction, are sufficient in a durable lease to make the estate a conditional one without an express clause of re-entry, and, if the way be obstructed, ejectment lies. Jackson v. Allen, N.Y., 3 Cow. 220, 225.

The word "conditions," as used in Acts Cong. April 14, 1802, 2 Stat. 153, and May 26, 1824, 4 Stat. 69, providing that an alien may be admitted to become a citizen on the "following conditions, and not otherwise," and specifying the proceeding for naturalization, cannot be held to mean that the applicant shall see to it that the proceedings are recorded. The conditions are well satisfied by limiting them to what the applicant is required to do in so far as his acts are concerned. In re Coleman, C.C.N.Y., Fed.Cas. No.2,980, 15 Blatchf. 406.

The word "condition," in statutes restricting effect of breach of condition in avoiding insurance policy, includes fire policy condition that insured must have fee-simple title to land involved, and other conditions precedent, and hence statute prevents avoidance of policy unless breach has caused

Restriction—Cont'd

increase of moral or physical hazard. Brough v. Presidential Fire & Marine Ins. Co., La.App., 176 So. 895, 900.

In an ordinance, granting to an electric company the "right to manufacture and vend" electricity to the city and the citizens, "subject to the provisions and conditions hereinafter contained," which conditions were to furnish certain lights and not to erect an ice plant on a certain lot, it was not a "condition" that the company "manufacture" its own electricity rather than purchase it from another, since the grant should be construed according to Vernon's Ann.Civ.St. art. 10, providing that the ordinary signification should be applied to words not technical, and since a condition ordinarily is any qualification, restriction, or limitation modifying or destroying the full enjoyment or use of a right, and under the maxim that the "expression of one thing is the exclusion of another," the word "manufacture" cannot be construed as more than mere description of the extent of the permit. City of Terrell v. Terrell Electric Light Co., Tex., 187 S.W. 966, 967.

Restriction distinguished

Where a deed clearly shows the intention of the parties that on breach of a restriction the estate should be defeated and returned to the grantor, the restriction is a "condition," whether the apt words to create a condition are used or not. Ball v. Milliken, 76 A. 789, 791, 31 R.I. 36, 37 L.R.A., N.S., 623, Ann.Cas.1912B, 30.

The word "restrictions," when used in connection with the grant of an interest in real property, is the equivalent of "conditions," and either term may be used to denote a limitation upon the full and unqualified enjoyment of the right or estate granted. The word "restrictions," in Pub.St. c. 113, § 7, providing for the location of street railways, subject to such restrictions as required by public interest, is the equivalent of "conditions," and therefore limitations may be imposed on the enjoyment of the right to use the streets granted for such purposes. Blodgett v. Worcester Consol. St. Ry. Co., Mass., 78 N.E. 222, 224, citing Skinner v. Shephard, 130 Mass. 180; Ayling v. Kramer, 133 Mass. 12; Clapp v. Wilder, 57 N.E. 692, 176 Mass. 332, 50 L.R.A. 120.

Terms

"Conditions," as used in a deed reciting that "this conveyance is made to the parties, their heirs and assigns, absolute and in fee simple with and on the following conditions," is used in its generic sense "to denote the predicament or status of the title, its condition, and, where a subsequent portion of the deed shows that the grantor only owned an equity of redemption in the land, the deed will not be considered as passing a fee simple." Dunlap v. Mobley, 71 Ala. 102, 105.

Under Const. art. 18, § 7, providing for the enactment of the Employers' Liability Law contained in Civ.Code 1913, para. 3154-3158, and its provisions making the employer liable for the death or injury of employee caused by any accident due to conditions of a hazardous occupation, the employer is liable when the injury is caused by an accident due to conditions of the employment, which conditions need not be inherent in the occupation, but may arise from the manner in which the business is carried on, the word "hazardous" being defined as "exposed to; exposing to; or involving danger; risk of loss or calamity; perilous; risky;" and the word "condition" being defined as "mode or state of being; state or situation with regard to external circumstances; essential quality; property; attribute." Consolidated Arizona Smelting Co. v. Egich, 199 P. 132, 134, 22 Ariz. 543.

Terms

Under statute requiring that conditional sales contract shall describe "all conditions of such sale", the terms of conditional sale, performance or nonperformance of which determines whether title shall be in vendee or vendor, constitute a "condition" in commonly accepted meaning of the word, and hence include provisions for payment at a certain date, failure to make which would end estate of the vendee. Standard Acceptance Corporation v. Connor, 15 A.2d 314, 316, 127 Conn. 199, 130 A.L.R. 720.

In an order granting a new trial on condition that the party pay all costs, the word "condition" is used as synonymous with the word "terms," and so does not render the order invalid as conditional. Galveston, H. & S. A. Ry. Co. v. Borden, Tex., 29 S.W. 1100, 1101.

Securities Act requiring brokers' bonds containing specified conditions, "with terms

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Terms—Cont'd

and in form to be approved by Secretary of State," held attempted unconstitutional delegation of authority; "terms" being synonymous with "conditions". Smith-Hurd Stats. c. 121½, § 118. People v. J. O. Beekman & Co., 179 N.E. 435, 437, 347 Ill. 92.

An allegation that plaintiff duly performed all the terms and obligations in a contract of employment on his part until a stated date held not a sufficient compliance with Rules of Civil Practice, rule 92, authorizing the pleading of a condition precedent in a contract by stating in general terms that the party in question duly performed all the conditions of such contract on his part, as due performance of the "terms and obligations" of the contract is not synonymous with "conditions." Berger v. Urban Motion Picture Industries, 201 N.Y.S. 489, 491, 206 App.Div. 379.

That the statute in force prior to Code 1906, § 800, providing that every new trial granted shall be on such "terms" as the court shall direct, read "terms and conditions," is immaterial, as the words are synonymous; "terms" meaning porpositions, limitations, or provisions stated or offered, and a "condition" is that which limits or modifies the existence or character of something; a restriction or qualification. Yazoo & M. V. R. Co. v. Scott, 67 So. 491, 495, 108 Miss. 871, L.R.A.1915E, 239, Ann.Cas.1917E, 880.

An order granting a new trial and directing the party to whom it was granted to pay witness fees as a "condition" upon which such new trial was granted, means that the payment of the fees was the terms on which the order was made, and not a condition on the performance of which it should take effect. In this connection the court says: "If the word 'condition' had no other meaning except that in which it is used in the law of conveyances, we might be constrained to hold that the order granting a new trial was to take effect only upon the contingency that the defendant should pay the costs, but such is not the fact. Among other definitions, Worcester gives its meaning as 'something to be done,' and in that sense, when plural, it is synonymous with 'terms.'" Fenn v. Gulf, C. & S. F. Ry. Co., 13 S.W. 273, 76 Tex. 380.

Where, pending the submission to arbitration of a controversy as to the ownership

Terms—Cont'd

of a tract of land known as the "Poke Run Place," the parties entered into an agreement whereby they "agreed that the contest as to the Poke Run Place be given up 'on condition' that Mr. Rugh shall in a reasonable time convey to Jacob Haymaker's three daughters the whole of the Poke Run Place by deed in fee simple, and, on said Rugh's doing so, said Haymaker quits all claims to said place," the word "condition" was obviously employed to express the same as "term of the agreement," as if it had read, "It is agreed that the contest be given up on the terms following," etc., and the agreement should be construed not as conditional, but absolute. Meanor v. McKowan, Pa., 4 Watts & S. 302, 305.

A resolution adopted by a city council pending a dispute with a street railroad company as to its franchise rights with respect to fares, etc., on certain streets, which permitted the company to continue operations from time to time "upon the same terms and conditions now prevailing in the city, whether due to contract agreement or not," though made when the city knew that the company was collecting extra fares on certain lines which were without the city limits when the franchises for such lines, which authorized extra fares, were granted, did not recognize the company's right to charge extra fares on such lines; the word "prevailing" having no technical meaning and as used signifying that which is common, in operation, or prevalent, while the words "terms" and "conditions" mean the propositions and limitations which comprise the agreement and govern the parties, defining their obligations, and, as applied to an ordinance giving a franchise, signifying the boundary limit or extent of the grant. City of Detroit v. Detroit United Ry., 139 N.W. 56, 59, 173 Mich. 314.

Trust created or implied

A grant of land to the bishop of a church, upon "condition" that it shall be forever held for the use of a certain church, does not necessarily create a technical estate on condition, so that the estate shall be revertible, but means simply that the estate is to be held in trust for the purpose named. The use of the term "condition" does not necessarily import the creation of a conditional estate but "condition" may

ist created or implied—Cont'd

mean "trust," and vice versa. Neely v. Hoskins, 24 A. 882, 883, 84 Me. 386.

The word "condition" is a term of flexible meaning. In leases it is often construed as a covenant. Express words of condition shall be taken for a limitation, if the nature of the case requires it. Words of express condition are not inapt as introductory to a declaration of trust. Every conveyance to a charitable use is a conveyance to hold upon the trust declared, and the execution of the trust is a "condition" upon which the estate is taken and held, to be given effect to, not by forfeiture of the title, but by those methods by means of which a court of equity compels the performance of such trusts. So, where a conveyance of a lot of land was made to a church and to their successors, but not to their assigns, with a habendum in these words, "To have and to hold unto the said party of the second part upon this express condition and limitation, that neither of said parties or their successors shall at any time sell, mortgage or in any way convey the said lands and premises," etc., it was held that the grant did not create a condition for the breach of which the grantors might enter as for a forfeiture of the estate, but created a trust, which the grantee taking the legal estate was bound to perform. Mills v. Davison, 35 A. 1072, 1075, 54 N.J.Eq. 659, 35 L.R.A. 113, 55 Am.St.Rep. 594.

Warranties

Where insured, in written application for reinstatement of lapsed life policy, stated that, for purpose of inducing insurer to reinstate policy, insured declared that he was in sound health and within the past two years had had no disease, injury, or impairment of health and had not consulted nor been treated by a physician, the insured's statement was a "representation," rather than a "warranty" or "condition," and the representation was not part of the contract. Sommer v. Guardian Life Ins. Co. of America, 24 N.E.2d 308, 311, 281 N.Y. 508.

A "warranty" can only exist where subject matter of sale is ascertained and existing, so as to be capable of being inspected at time of contract, but where subject matter is not in existence, or not ascertained, an engagement that it shall, when existing or ascertained, possess certain qualities, is not a mere "warranty" but a "condition," performance of which is precedent to any obligation upon buyer under contract, since existence of these qualities, being part of description of thing sold, becomes essential to its identification, and buyer cannot be obliged to receive and pay for a thing different than that for which he contracted. Chiquita Mining Co. v. Fairbanks, Morse & Co., 104 P. 2d 191, 195, 60 Nev. 142.

Warranties—Cont'd

In insurance law the terms "warranty" and "conditions" are often used interchangeably. Mutual Life Ins. Co. of New York v. Mandelbaum, 92 So. 440, 441, 207 Ala. 234, 29 A.L.R. 649.

In a contract for sale of storage battery equipments for street cars, which provided that the plant shall be considered satisfactory if it fulfills the "following conditions," it was held that the "conditions" did not mean merely conditions upon which the vendee might compel the acceptance of the equipment, but were warranties for the breach of which damages might be recovered. Accumulator Co. v. Dubuque St. Ry. Co., Iowa, 64 F. 70, 77, 12 C.C.A. 37.

Under Vernon's Ann.Civ.St. art. 4235, providing no breach by insured of a warranty or condition of a fire policy shall void it unless contributing to bring about destruction of the property, the owners of household goods, in storage, and insured against fire while on the particular premises, and not elsewhere, could recover for their destruction in premises to which the warehousemen removed the goods; such removal by insured through their agents being a breach of "condition," and not having caused the loss. Allemania Fire Ins. Co. v. Angel, Tex., 214 S.W. 450, 451.

In American Popular Life Ins. Co. v. Day, 39 N.J.L.(10 Vroom) 89, 23 Am.Rep. 198, in our court of last resort, "warranties" and "conditions" in insurance policies are treated as synonymous terms, as indeed they are. In Sonneborn v. Manufacturers' Ins. Co., 44 N.J.L.(15 Vroom) 220, 43 Am.Rep. 365, it was declared in the same court that a promissory warranty had the nature of a condition precedent. That every inducing statement made a warranty by a policy of life insurance shall be true is plainly a condition precedent to the insurer's liability under such policy. In Eddy Street Iron Foundry v. Hampden Stock & Mut. Fire Ins. Co., 8 Fed.Cas. 300, Clifford,

Warranties—Cont'd

the vendor to deliver an article of a specified quality or description, or out of a breach of representation which is material to the contract, or out of such a breach when the representation or warranty is implied instead of express. In either case there is an agreement, in substance and purport, to the same effect; in either, a breach of it works the same injury to the vendee; whether the cause of action is for a breach of contract or for the breach of a warranty is a mere matter of nomenclature. Cleveland Linseed Oil Co. v. A. F. Buchanan & Sons, N.Y., 120 F. 906, 908, 57 C.C.A. 498, citing Bagley v. Cleveland Rolling Mills Co., C.C.N.Y., 21 F. 159.

See Warranty. Shinn v. Family Reserve Ins. Co., 33 So.2d 741, 742, 33 Ala.App. 281.

Wealth

The word "condition," in an instruction in an action for libel that in estimating damages the jury are to consider plaintiff's injured feelings and tarnished reputation, taking into account the nature of the imputation, extent of its publication, the character, "condition," and influence of the parties, and all the surrounding circumstances, refers rather to social standing than to wealth, for it would not be the legitimate and natural construction of the word to consider it as meaning wealth. Buckstaff v. Hicks, 68 N.W. 403, 404, 94 Wis. 34, 59 Am.St.Rep. 853.

CONDITIONAL

Cross References

Fee Conditional

Unconditional; Unconditionally

Where will making bequests to charities contained provision revoking bequests in absence of express consent in writing of testator's widow, and widow gave consent within time limited by will, bequests were so "conditional" as to preclude deduction under statute authorizing a deduction for estate tax purposes of gifts to corporations organized for religious, charitable, scientific and educational purposes, as against contention that bequests vested at time of testator's death on theory that when widow gave her consent her act related back to time of testator's death. First Trust Co. of St. Paul v. Reynolds, D.C.Minn., 46 F.Supp. 497, 502.

WORDS AND PHRASES

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on with current or private owners of land across ch easement is sought. MacCaskill v. Ebbert, , 739 P.2d 414, 418, 112 Idaho 1115.

IDEMNATION AWARD

mount received for unlawful appropriation of was award of "damages" and not "condemna- award" within agreement providing that one should receive 30% of any award for damages sh paid in settlement of claim for such appro- on, but that 30% provision applied only to ges and not to condemnation award. Proser v. r, Fla.App., 132 So.2d 439, 442.

DEMNATION BLIGHT

constitute "Condemnation Blight" there must ome evidence that competent authority having ction asserted control or threatened to con- the property. In re Searingtown Road, Town th Hempstead, Nassau County, 326 N.Y.S.2d 9, 68 Misc.2d 405.

idemnation blight" relates to impact of cer- s upon value of the subject property; it in no ports a taking in the constitutional sense, but permits a more realistic valuation of con- property in subsequent de jure proceeding; such case, compensation shall be based on property at time of the taking as if it had n subjected to the debilitating effect of a ed condemnation. City of Buffalo v. J. W. Co., 269 N.E.2d 895, 903, 28 N.Y.2d 241, S.2d 345.

MNATION BY PUBLIC AUTHORITIES

"condemnation by public authorities" in viding that if leased premises are damaged condemnation by public authorities," storm, act of God, unavoidable accident, or public extent not rendering them untenantable, lord shall restore and rent shall not abate, if premises are injured by any of those as to be partially untenantable, landlord re and rent shall abate proportionately, if premises are injured by any of those as to be wholly untenantable, lease shall id did not include condemnation by emi- ain, and tenant had right to share in ion award in eminent domain proceeding. lothes, Inc. v. Fleet, 184 A.2d 731, 734, 5?

ATION IN REVERSE

nation in reverse" principle rests on aking, destroying, or injuring of property without any color of right or title to do Dept. of Highways v. Davidson, Ky., 383 348.

ghway department took part of farm by by mistake performed construction, contractor, on strip which was not in- deed, there was condemnation proceed- e, or what is sometimes called "condem- erse", and proper forum for court action ity where land lay. Com., Dept. of Gisborne, Ky., 391 S.W.2d 714, 716.

CONDEMNATION PROCEEDINGS

See, also, Statutory Condemnation Proceedings.

In general

City's acquisition of transportation company's property under terms and conditions of franchise agreement was not a "condemnation proceeding." Application of City & County of Honolulu Corporation Counsel, Hawaii, 507 P.2d 169, 171.

By filing petition asking that commissioners be appointed to determine just compensation for land taken, highway commissioner instituted "condemnation proceedings" and court should have allowed interest on excess, if any, of award, as finally approved by court, over certified amount computed to date of order confirming, altering or modifying commissioners' award or, if later, to date of payment into court. Whitworth v. State Highway Commissioner, Va., 161 S.E.2d 698, 702, 209 Va. 95.

CONDEMNATIONS EFFECTED

"Condemnations effected" within meaning of section of Eminent Domain Code providing that it shall apply to all condemnations effected after September 1, 1964, means actual undertaking of work and not merely filing of a grade change plan. Pane v. Com., Dept. of Highways, 222 A.2d 913, 917, 422 Pa. 489.

CONDEMNEE

Tenant is a "condemnee" within meaning of statute providing that when tenant's leasehold interest is taken, injured or destroyed, tenant is entitled to just compensation. In re Com., Dept. of Transp., 447 A.2d 342, 344, 67 Pa.Cmwlth. 318.

Lessee of property purchased by municipal authority is not entitled, after termination of lease, to status of "condemnee" under Eminent Domain Code. Appeal of Radio Broadcasting Co., 55 Pa. Cmwlth. 147, 423 A.2d 444, 450.

Word "condemnee," within eminent domain code permitting a condemnee to express an opinion regarding value of property in an eminent domain proceeding, includes any party with an interest in property and, hence, includes a mere lessee. Baldassari v. Baldassari, 420 A.2d 556, 560, 278 Pa.Super. 312.

Where condemning authority purchased rental property from landlord, entered into six-month lease with commercial tenants, and thereafter allowed such six-month lease to expire by its terms, giving due notice to tenants, tenants were neither "condemnees" nor "displaced persons," and were therefore entitled neither to compensation for taking of their leasehold interest nor to moving and related expenses of displaced persons. Hindsley v. Lower Merion Tp., 360 A.2d 297, 298, 25 Pa.Cmwlth. 455.

Owners of property which abutted proposed site of transmission line, but whose land was not subject of condemnation action, were not "condemnees" within meaning of statute which sets forth conditions under which attorney fees and expert witness fees are to be awarded to condemnees, despite property owners' contention that they were inverse condemnees as result of aesthetic damage to their property. Public Utility Dist. No. 1 v. Kottsick, 545 P.2d 1, 4, 86 Wash.2d 388.

Lessee who operated miniature golf course on property that was taken in eminent domain proceeding was a "condemnee" within meaning of eminent domain statute allowing condemnee to testify without further qualification as to just compensation, and he could testify as to reproduction costs as an element in his valuation of his interest. Hoffman v. Com., 221 A.2d 315, 319, 422 Pa. 144.

CONDEMNER

The term "condemner," as used in statute providing for award of reasonable attorney fees if action is abandoned by condemner, means person who brought the condemnation proceedings, whether he was qualified to do so or was either within the definition of a condemner but for some reason disqualified from bringing condemnation action in particular case or did not qualify as a condemner under the definitional statute. Braat v. Andrews, 514 P.2d 540, 542, 266 Or. 537.

CONDEMNING BODY

Georgia Ports Authority is not a "condemning body" within chapter relating to condemnation before special master and defining condemning body as state or any branch of government of state or political subdivision of state and authority was not authorized to exercise power of eminent domain under the act. Scarlett v. Georgia Ports Authority, 156 S.E.2d 77, 78, 223 Ga. 417.

CONDEMNOR'S PROOF

"Condemnor's proof" was State's initial offer within meaning of statute permitting award of actual and necessary costs, disbursements, and expenses incurred by landowner if award is substantially in excess of condemnor's proof. Long Island Pine Barrens Water Corp. v. State, N.Y.Ct.Cl., 544 N.Y. S.2d 939, 940.

CONDITION

See, also,

Accepted in its Present Condition.
Apparent Good Condition.
Artificial Condition.
Acute Manifestation of Chronic Condition.
Change in Knowledge or Conditions.
Change of Conditions.
Change of Conditions Affecting Neighborhood.
Changing Conditions.
Circumstances and Conditions.
Concurrent Conditions.
Constructive Condition.
Covenant or Condition.
Destitute Condition.
Disease Condition.
Dormant Non-Disabling Disease Conditions.
Employment Condition.
Estate on Condition.
Extrahazardous Condition.
Extraordinary Conditions.
General Covenant or Condition.
Habitable Condition.
Handicapping Conditions.
Impaired Condition.
Impairment of Physical Condition.
Impossible Condition.
Improved in Condition.
In Apparent Good Order and Condition.
In its Present Condition.
Injuries or Conditions.
Lawful Condition.

Material Change in Conditions and Circumstances.
Natural and Ordinary Conditions.
Normal operating conditions.
On Same Terms And Conditions.
Operable Condition.
Original Condition.
Other Existing Conditions.
Other Condition.
Paranoid Condition.
Poor Condition.
Potestative Condition.
Pre-Existing Condition.
Problems or Conditions.
Promissory Condition.
Purely Potestative Suspensive Condition.
Put In Good Condition.
Record of Act, Condition or Event.
Resolutive Condition.
Restored to Same Condition.
Safe Condition.
Safe Mechanical Condition.
Simple Potestative Condition.
Social Condition.
Some Exceptional Condition.
Special Term And Condition.
Subsidiary Condition.
Such Other Conditions.
Terminal Condition.
Terms and Conditions.
Terms and Conditions of Labor.
Then Condition.
Unconstitutional Conditions.
Under the Same Terms and Conditions.
Unforeseeable Condition or Hardship.
Unreasonably Dangerous Condition.
Unsanitary Conditions.
Without Condition or Reservation.
Without Respect to Future Changes in Conditions.
Work Conditions.
Worsened Conditions.

In general

For purpose of determining whether known or obvious danger rule relieved swimming pool manufacturers and landowners from liability to man paralyzed in diving accident for failure to warn of shallowness of pool, water of unknown depth was a known "condition." Griebler v. Doughboy Recreational, Inc., Wis.App., 449 N.W.2d 61, 64.

Situation in which rocks were thrown at automobiles by unknown persons standing on bridge over the highway was a "condition" for purposes of statutory waiver of sovereign immunity for damages caused by dangerous condition of Commonwealth real estate. Mistecka v. Com., 408 A.2d 159, 162, 46 Pa.Cmwlth. 267.

The physical condition of a motor vehicle is a "condition" contemplated by statute prohibiting operating of a motor vehicle at a speed greater than is reasonable or proper, having due regard to the traffic, surface and width of the street or highway and any other conditions. State v. Saffell, 337 N.E.2d 622, 624, 44 Ohio St.2d 39, 73 O.O.2d 228.

Car dealer's representation of vehicle as an executive demonstrator when in fact vehicle was previously owned by an automobile leasing company did not constitute a misrepresentation as to "condition" of automobile within statute authorizing license suspension for such misrepresentation. Fitzpatrick's Inc. v. Commissioner of Motor Vehicles, 334 A.2d 476, 478, 165 Conn. 416.

The term "condition," in State Tort Claims Act provision imposing liability, inter alia, as to claim arising from condition of traffic control signal which has not been corrected by governmental unit responsible within reasonable time after notice has been given to such unit, referred to either an intentional or inadvertent state of being. Sparkman v. Maxwell, Tex., 519 S.W.2d 852, 857.

Obstruction of traffic sign by trees or bushes is "condition" of such sign, exposing municipality to liability under Tort Claims Act for negligent failure to keep view of sign unobstructed. Kenneally v. Thurn, Tex.App. 4 Dist., 653 S.W.2d 69, 72.

Lack of virginity is not "condition" under exception to rape shield law permitting admission of "evidence of recent conduct of the victim alleged to be the cause of any physical feature, characteristic, or condition of the victim." Com. v. Elder, 452 N.E.2d 1104, 1111, 389 Mass. 743.

Term "condition" as it is used in the statute for grant of permits by Pollution Control Agency is different from term "person" and PCA exceeded authority by naming parent corporations as additional parties to permit allowing taconite company to drain water from taconite pit into city storm sewer system as a condition of the permit. Matter of Hibbing Taconite Co., Minn.App., 431 N.W.2d 885, 890.

Failure to warn travelling public of obstruction placed on highway by a person in a manner such as to constitute negligence is "continuing negligence" as distinguished from "condition." Looney v. Pickering, 439 N.W.2d 467, 472, 232 Neb. 32.

Standard comprehensive general liability policy issued to association of steamship, stevedore, and terminal companies and which provided coverage for "accident" and "condition" resulting in bodily injury did not provide coverage for intentional discrimination in hiring. Industrial Indem. Co. v. Pacific Maritime Ass'n, 777 P.2d 1385, 1388, 97 Or.App. 676.

Spondylolisthesis constitutes a "condition" within meaning of statute governing apportionment of liability for permanent disability between an employer and the Special Fund where a preexisting dormant condition is aroused into disabling reality by a subsequent injury or occupational disease; thus, where employee, who injured his back in work-connected accident, sustained a 20% permanent disability, one-half of which was attributed to arousal of the preexisting dormant spondylolisthesis, employer was required to bear responsibility for payment of 10% partial disability while the Special Fund bore ultimate responsibility for the remaining 10% disability. Yocom v. Gibbs, Ky., 525 S.W.2d 744, 746.

In statute providing that each governmental unit shall be liable for money damages for personal injuries or death caused from some condition or use of tangible property but that such statutory liability shall not apply to absence, condition or malfunction of any traffic or road sign unless such absence, condition or malfunction is not corrected by governmental unit responsible within reasonable time after notice, word "condition" was not intended to refer to state's installation or maintenance of sign or signal insofar as ease of its removal by thieves was concerned but rather to maintenance of sign or signal in condition sufficiently to perform its intended function. Lawson v. McDonald's Estate, Tex. Civ.App., 524 S.W.2d 351, 355.

A "condition" is something established or agreed upon as a requisite to the doing or taking effect of something else. State v. Community Distributors, Inc., 304 A.2d 213, 218, 123 N.J.Super. 589.

Exclusion clause providing that aircraft policy did not apply to any damage occurring while aircraft was operated in flight by other than pilot or pilots described separately in the declarations did not constitute either a "warranty" or a "condition" within meaning of statute providing that breach of a warranty or condition in any contract or policy of insurance shall not avoid the policy or avail insurer to avoid liability unless such breach exists at time of loss and contributes to the loss. Omaha Sky Divers Parachute Club, Inc., v. Ranger Ins. Co., 204 N.W.2d 162, 164, 189 Neb. 610.

Term "condition" within lease permitting lessee to cancel lease if any law, decision, regulation or condition should exist making it unprofitable for lessee to carry on its business was not restricted to a condition of the same general character as a law, decision or regulation and lessee could cancel lease on ground that it had lost receivables, prime rate of interest had increased, it had suffered several armed robberies and customers were reluctant to do business in area of lease premises. S & H Realty & Inv. Co. v. Consumers Budget Loan Co., 289 N.E.2d 696, 698, 8 Ill.App.3d 206.

Stop sign's obstruction from view by trees or branches is "condition" of such sign within meaning of State Torts Claims Act provision permitting claim against city arising from absence, condition or malfunction of traffic or road sign. Lorig v. City of Mission, Tex., 629 S.W.2d 699, 701.

For purpose of rule that for a material breach of contract that is not a failure to satisfy a condition of a licensing agreement, a copyright licensor has only cause of action for breach of contract, a "condition" is any fact or event which qualifies a duty to perform. Costello Pub. Co. v. Rotelle, C.A., 670 F.2d 1035, 1045, 216 U.S.App.D.C. 216.

Proof of child's being found naked, unattended and unwashed on a date prior to time child was removed from custody of natural mother was not proof of "conditions" for failure of which to rectify mother was to suffer severance of her parental relationship since the mother could not dress, wash and attend to the child and thus rectify the conditions after he had been removed from her custody, and the conditions were not of a continuing character because the incident, though indicating negligence, was isolated. R. L. L. v. Strait, Mo.App., 633 S.W.2d 409, 411.

Doctor's report upon an electroencephalogram test is "record" of "condition" under Business Records as Evidence Act applicable in civil cases. Kraner v. Coastal Tank Lines, Inc., 257 N.E.2d 750, 755, 22 Ohio App.2d 1.

A "condition" is any qualification, restriction, or limitation annexed to a gift, and modifying or destroying essentially its full enjoyment and disposal. In re Wachstetter's Estate, 216 A.2d 66, 69, 420 Pa. 219, 25 A.L.R.3d 752.

In a contract, a "condition", whether precedent or subsequent, may be either express, implied in fact, or constructive. Ross v. Harding, 391 P.2d 526, 530, 64 Wash.2d 231.

Terms "disability" and "condition" are synonymous only in a limited sense; a "disability" is a "condition" but "condition" is much broader term than "disability". Brunson v. Strong, 412 P.2d 451, 452, 17 Utah2d 364.

Use of word "conditions" in deposit receipt contract for sale of land as an exception to obligation to convey marketable title would encompass and include a condition coupled with a possibility of reverter. Hurd v. Becker, Fla.App., 165 So.2d 420, 422, 423.

Even if there was causal relationship between fact that locus for which variance was sought was contiguous to business zone which had become highly commercialized and fact that cost of residential development of property was prohibitive, such contiguity could not be considered a "condition" especially affecting land, within meaning of statute. Coolidge v. Zoning Bd. of Appeals of Framingham, 180 N.E.2d 670, 673, 343 Mass. 742.

A "condition" is normally a limitation of some otherwise broader provision as distinguished from an independent obligation assumed by promisor. Bluewaters, Inc. v. Boag, C.A.Mass., 320 F.2d 833, 835.

The difference between "condition" and "conditional limitation" is that in former, re-entry is necessary, in case of breach, to effectuate forfeiture, while in latter, it is not. De Kay v. Board of Ed. of Central School Dist. No. 2, of Towns of Bath, Cameron, Wheeler, Urbana, Thurston, Avoca and Howard, Steuben County, 189 N.Y.S.2d 105, 108, 20 Misc.2d 881.

Failure of road contractor to warn the traveling public that highway is dangerous to travel or that obstructions have been placed thereon constitutes continuing negligence as distinguished from a "condition". Kuska v. Nichols Const. Co., 48 N.W.2d 682, 687, 154 Neb. 580.

Provision of accident and health policy that insurance shall not cover any person over age of 65 years constitutes a "condition" or "limitation" for benefit of insurer and not for benefit of insured, and is subject to waiver by insurer. American Home Mut. Life Ins. Co. v. Harvey, 109 S.E.2d 322, 325, 99 Ga.App. 582.

While the word "condition" may conceivably embrace almost any circumstance, upon which, or, because of which, a right is created or liability attaches, it cannot be used to mean surrender of fundamental personal and property absolutes unless word appears within a setting which warns of potency of capitulation being made. Cutler Corp. v. Latshaw, 97 A.2d 234, 236, 374 Pa. 1.

Quoted words, in statute enabling utility to contract with manufacturer without reference to prescribed rates or other "conditions", had reference to other conditions and factors relevant to rates and did not authorize Commission, in approving utility's

...tract with manufacturer, to disregard requirements of another utility's grandfather clause certificate. Capital Elec. Power Ass'n v. Mississippi Power & Light Co., 125 So.2d 739, 744, 240 Miss. 139.

Where contract whereby city redevelopment agency conveyed land provided that "in the event the holder or holders of such building loan agreements and/or first mortgages in replacement thereof shall fail to complete the work in area covered," grantee "shall reconvey" to agency all property conveyed with improvements "but subject to existing building loan agreements and/or first mortgages in replacement thereof," language spelled out intention that conveyance was on "condition" of performance within specified time, and hence failure to perform within specified time entitled agency to compel a reconveyance of premises subject to equitable lien against property in favor of mortgagee to extent that his money had been used for acquisition and retention of the property, as against contention that mortgagee had right to complete the performance beyond the specified time. Feldman v. Urban Commercial, Inc., 165 A.2d 854, 863, 64 N.J.Super. 364.

In statute providing that Public Utilities Commission shall not require company to issue stock under "terms" or "conditions" not required by general statutes, the quoted words are employed in the sense in which they are ordinarily used, "terms" means time and amounts of payment, stipulations regarding payment, price or wages, and "conditions" includes that which limits or modifies the existence or character of something, a restriction or qualification. Southern New England Tel. Co. v. Public Utilities Commission, 134 A.2d 351, 354, 144 Conn. 516.

Lease providing that in case of "condition" effectual in city, state, or nation adversely affecting or making it unprofitable for lessee to carry on its business on leased premises, lease may be cancelled by lessee by 90-day notice, did not give lessee right to cancel lease because of existence of any condition or because of existence of unfavorable economic conditions; word "condition" was required to be read in context with other words of paragraph of lease and in such context referred to conditions in nature of laws or law-like conditions. Lloyd v. Merit Loan Co. of Shreveport, La.App., 245 So.2d 427, 429.

Phrase "harmful effects" as utilized in particular statute defining "Child in need of assistance" affords adequate guidance for its application and enforcement, but term "conditions" is indefinite, and statute, under which petition was filed, fell short of standard of specificity constitutionally required as matter of due process. In Interest of Wall, Iowa, 295 N.W.2d 455, 458.

There is no support for conclusion that where disabling mental condition is shown to be causally related to industrial injury it is compensable only if it bears definition of "disease" or "illness" as opposed to any other label; terms "disease," "condition," and "disability" have been used interchangeably in the discussion of mental conditions alleged to be causally related to industrial injury. Hooper v. Industrial Commission of Arizona, App., 617 P.2d 538, 540, 126 Ariz. 586.

Limitation of word "condition" to preexisting disease under prior existing law was inapplicable to ...n context of statute providing that compensation will be allowed only for such proportion of disability resulting from aggravation of preexisting "condition" as may be attributable to compensable injury. Balliet v. North Dakota Workmen's Compensation Bureau, N.D., 297 N.W.2d 791, 793.

Use of word "condition" in workmen's compensation statute providing for allowance of compensation for disability resulting from aggravation of preexisting "condition" in proportion attributable to compensable injury does not allow Workmen's Compensation Bureau to prorate benefits in case where claimant has had no previous impairment, but rather, to activate statute, preexisting condition must be accompanied by actual impairment or disability known in advance of work-related injury; overruling in part Stout v. N. D. Workmen's Compensation Bureau, 236 N.W.2d 889 (N.D.1975). Id.

Cause distinguished

Distinction between a "cause" and a "condition" is the element of foreseeability. Long v. Ponca City Hospital, Inc., Okl., 593 P.2d 1081, 1086.

Where fire aboard tug while in shipyard had been caused by shipyard's negligence and its additional errors, in failing to properly extinguish fire, were exactly of same kind as tug owners, shipyard's negligence could not properly be held to have been only a "condition" rather than a "cause" of the ultimate damage resulting from fire which, after being incompletely extinguished on several occasions, finally ran out of control and caused extensive damage to vessel. Southport Transit Co. v. Avondale Marine Ways, Inc., C.A.La., 234 F.2d 947, 951.

Where course adopted by Coast Guard cutter, in attempting to tow barge in course of rescue operation at sea, would have been a successful one had barge followed in a proper course, navigation of cutter close to breakwater, with which barge collided, was merely a "condition" and barge's failure to follow the cutter was the "cause" of the barge's damage, and therefore libel by owner of barge against the United States should have been dismissed. P. Dougherty Co. v. U.S., C.A.Del., 207 F.2d 626, 632.

Cause of injury distinguished

Irritation of workmen's compensation claimant's nerve roots because of the presence of ruptured disc was an "injury" rather than a "condition," where claimant received ruptured disc at work and experienced pain as result thereof, so that statute providing that preliminary agreement may be amended if due to a failure to correctly diagnose injury it fails to set out correctly all the injuries received or fails to set out all parts of the body affected by such injuries was applicable. U.S. Rubber Co. v. Curis, 226 A.2d 410, 415, 101 R.I. 627.

Conditional limitation and limitation distinguished

A "condition" is a limitation, and does not create an obligation, nonperformance of which would constitute default. Adair v. Kona Corp., 452 P.2d 449, 454, 51 Haw. 104, 140.

In order to terminate lease for breach of "condition" in lease, some act must be done on happening of contingent event such as making an entry, but in order to terminate lease in case of breach of "conditional limitation" in lease, mere happening of event

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is, in itself, limit beyond which lease no longer exists and in such a case, no entry or other act is necessary to terminate lease. Jamaica Builders Supply Corp. v. Buttelman, 205 N.Y.S.2d 303, 306, 25 Misc.2d 326.

Where, upon happening of an event, landlord has option to continue or to terminate lease, lease does not expire by its own limitation on happening of the event, and there is merely a "condition", so that some act must be done in order to defeat the estate, and not a "conditional limitation", so that happening of event automatically terminates the estate. Obedin v. Masiello, 191 N.Y.S.2d 254, 258, 20 Misc.2d 101.

Clause of lease providing that if land whereon building stood or any part thereof should be condemned for public use, lease, at option of landlord, shall become void, created a "condition", so that some act was required to be done by landlord in order to defeat the estate, and not a "conditional limitation", so that happening of the event automatically terminated the estate. Id.

Consideration

Under Vehicle Code section which prohibits operation or parking of vehicles on the grounds of, inter alia, private universities, except subject to "conditions and regulations" imposed by university officers, private university's governing board could impose "conditions and regulations" pertaining to parking and because parking fee was a "condition" within the meaning of the section, university had authority to charge faculty, staff and students a fee to park on university property. United Stanford Emp., Local 680 v. Board of Trustees of Leland Stanford Junior University, 136 Cal.Rptr. 553, 556, 67 C.A.3d 319.

Covenant distinguished

Requirement that testatrix' husband pay for insurance, taxes, and repairs on home he selected from those owned by testatrix was a "covenant" and not a "condition". Austin v. Pepperman, 179 So.2d 299, 308, 278 Ala. 551.

Provision of oil and gas lease that while shut-in royalty is paid the well shall be held to be a producing well within meaning of paragraph providing that lease should remain in force as long as gas is produced or producible was a "condition," not a covenant, and lessees' failure to pay the annual sum rendered applicable the provision for termination in event of cessation of production and lease terminated upon failure of lessees to conduct drilling operations within 90-day period after cessation of production due to leak in gas pipeline. Greer v. Salmon, 479 P.2d 294, 298, 82 N.M. 245.

Courts abhor a forfeiture and will construe a clause as a "covenant" rather than as a "condition" if it is possible to do so. Royce, Inc. v. U.S., Ct.Cl., 126 F.Supp. 196, 204.

Where provision of printed lease stated space was "to be used exclusively for following purposes (see instruction number 3): military purposes", the words "military purposes" being typed in blank space, and where instruction number 3 stated that only general nature of use was to be specified, provision was not a "limitation" or "condition" but was descriptive and, at most, a "covenant", any breach of which would not result in forfeiture. Id.

A distinction exists between a "covenant" and a "condition," in that a breach of a covenant will not per se effect a forfeiture of title, whereas breach of a condition will entitle a grantor to a revesting of title. Feldman v. Urban Commercial, Inc., 165 A.2d 854, 863, 64 N.J.Super. 364.

Provision in automobile collision policy that in case lessee, mortgagor, or owner shall neglect to pay any premium due under policy, lienholder shall, on demand, pay the premium embodied a "condition," which required lienholder to pay premium only from and after date of demand, if lienholder desired to keep insurance in force, and did not embody a "covenant" on part of lienholder to pay the premium. General Credit Corp. v. Imperial Cas. & Indem. Co., 95 N.W.2d 145, 152, 167 Neb. 833.

If breach of agreement pertains to the validity of the instrument or is a ground for forfeiture, it is a "condition," while if the remedy for breach is an action at law for damages, the agreement is a "covenant." Buchanan v. Johnson, Tenn.App., 595 S.W.2d 827, 831.

Creation and Construction

As used in deposit receipt contract for sale of realty excepting, inter alia, from obligation to convey marketable title "conditions" of record running with the land, quoted word included condition appearing in conveyance in chain of title providing for reverter upon 60 days' notice to comply with enumerated restrictions, conditions and limitations and failure to comply therewith, and hence reverter clause did not relieve purchasers from obligation to accept title subject thereto. Hurd v. Becker, Fla.App., 165 So.2d 420, 422, 423.

Event or contingency

A "condition" is premise upon which fulfillment of an agreement depends; also covenant and provision making effect of legal instrument contingent upon uncertain event. Matter of J.M.J., S.D., 368 N.W.2d 602, 606.

Term "condition" is ordinarily reserved to describe acts or events which must occur before a duty of performance under an existing contract becomes absolute. Hardin v. Cliff Pettit Motors, Inc., D.C.Tenn., 407 F.Supp. 297, 300.

Within statute providing that whenever property is transferred and any right is dependent upon contingency or condition, whereby it may be created, defeated, extended or abridged, inheritance tax shall be imposed upon transfer and shall be highest tax which would probably become payable upon transfer under circumstances presented by the contingency or condition, "contingency" or "condition" do not include fiduciary powers of invasion held by trustee. In re Coleman's Estate, 535 P.2d 227, 232, 35 Colo.App. 390.

"Promise" is manifestation of intention to act or refrain from acting in specified way, so made as to justify promisee in understanding that commitment has been made, whereas "condition" is event, not certain to occur, which must occur, unless its nonoccurrence is excused, before performance under contract becomes due. Merritt Hill Vineyards, Inc. v. Windy Heights Vineyard, Inc., 460 N.E.2d 1077, 1081, 61 N.Y.2d 106, 472 N.Y.S.2d 592, 596.

Limitation of risk or liability

A "condition" in a contract is a clause which has for its object the suspension, rescission, or modification of the principal obligation. George v. Houston Boxing Club, Inc., Tex.Civ.App., 423 S.W.2d 128, 132.

Requirement of group insurer that employees to be eligible must be employed at least 30 hours a week was a "condition" of insurance and not a "limitation" of the risk and insurer which failed to investigate during contestable period to determine whether one employee worked 30 hours per week could not be heard to complain after death of employee and beneficiary was entitled to recover on policy. Simpson v. Phoenix Mut. Life Ins. Co., 247 N.E.2d 655, 659, 24 N.Y.2d 262, 299 N.Y.S.2d 835.

Within rule that owner of property is not liable for spread of fire which is accidentally started thereon by act of stranger or by some other cause with which he is not connected, unless he is guilty of negligence in respect to the "condition" of his premises or in failing to prevent the spread of the fire, after he has notice of the existence of the fire on premises, "condition" contemplates an unusually hazardous situation affirmatively created or maintained by the owner which gives rise to an extraordinary and undue risk of combustibility, and such situation must arise from a cause other than the mere age of the building. B. W. King, Inc. v. Town of West New York, 230 A.2d 133, 138, 49 N.J. 318.

Provision

The word "condition", as used in Louisiana statute providing that a person may, in his own name, make some advantage for third person the "condition" or consideration of a commutative contract, was not intended to mean a future and uncertain event, but rather was used in the sense of a charge or provision imposed upon or made part of a contract or donation. Merco Mfg., Inc. v. J. P. McMichael Const. Co., D.C.La., 372 F.Supp. 967, 972.

Provision of lease that if tenant should default in payment of rent, landlord could, without notice, re-enter by force or otherwise and dispossess tenant by summary proceedings or otherwise was "condition" rather than "conditional limitation," and therefore landlord's remedy was removal by reasonable force or by re-entry but not by summary proceedings unless tenant was presently in default of rent and proper notice or demand had been given. 19 South Main St. Corp. v. Phalanx Motors, Inc., 232 N.Y.S.2d 431, 434, 36 Misc.2d 114.

In contract writing "condition" is often used as synonymous with term, provision or clause. Reynolds-Fitzgerald, Inc., v. Journal Pub. Co., D.C.N.Y., 15 F.R.D. 403, 404.

Provision in deed conveying 40-acre tract to elders of local Presbyterian Church for full value that if there should cease to be church tract should be appropriated to use of common school at place was not a "condition", and trustees of Presbytery were entitled to tract on dissolution of local church. Trustees of Transylvania Presbytery, U.S.A., Inc. v. Garrard County Bd. of Ed., Ky., 348 S.W.2d 846, 852.

As to whether provision in insurance contract is condition or exclusion, for purposes of determining coverage under Georgia law, word "exclusions" signifies subject matter or circumstances in which insurer will not assume liability for specific risk or hazard that otherwise would be included within general scope of policy, while "condition" is provision inserted in contract for insurer's benefit that requires fulfillment of certain prerequisites before benefits will be released to beneficiary under the contract. Ideal Mut. Ins. Co. v. Lucas, D.C.Ga., 593 F.Supp. 466, 468.

Qualification synonymous

"Condition" in law of realty is qualification or restriction annexed to conveyance of lands whereby it is provided that in case particular event does or does not happen, or in case grantee does or omits to do a particular act, an estate may be defeated. Birnbaum v. Rollerama, Inc., 232 N.Y.S.2d 188, 190.

A "condition" is a qualification or restriction annexed to conveyance of lands, whereby it it provided that, in case a particular event does not happen, or in case grantor or grantee does or omits to do a particular act, an estate shall commence, be enlarged, or be defeated. Hurd v. Becker, Fla.App., 165 So.2d 420, 422, 423.

Quality

In evidence rule governing admissibility of written statement of act done or an act, "condition" or event observed by public official, word "condition" is to be defined as meaning quality or characteristics of a state of being, and is confined to perceptions of a quality or characteristic and excludes an interpretation of those perceptions. State v. Malsbury, 451 A.2d 421, 423, 186 N.J.Super. 91.

Status

Word "condition" as used in statute authorizing revocation of license of car dealer who misrepresents condition of any car sold must be given its plaint and ordinary meaning of the actual mechanical status of automobile, its state of repair or performance, and cannot be construed to mean a misrepresentation pertaining to prior ownership of vehicle. Fitzpatrick's Inc. v. Commissioner of Motor Vehicles, 334 A.2d 476, 478, 165 Conn. 416.

Where alien had served honorably in United States Navy for more than three years and had filed preliminary form for petition for naturalization prior to repeal of statute making it unnecessary for alien who had so served in armed forces to have first been lawfully admitted to United States for permanent residence as condition precedent to naturalization, alien acquired a "status", "condition," and "rights in process of acquisition" within saving clause of repealing statute and would not be required to establish as condition precedent to naturalization that he had been lawfully admitted to the United States for permanent residence. Immigration and Nationality Act, §§ 318, 328, 405(a), 8 U.S.C.A. §§ 1429, 1439, 1101 note. In re Jocson, D.C.Hawaii, 117 F.Supp. 528, 529.

Alien, whose status was adjusted to permanent resident as of April, 1948, by his continuous residence and physical presence in United States for 56 months prior to effective date of 1952 act providing that no person shall be naturalized unless he has been physically present in United States for periods totaling at least half of five years preceding filing of

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his petition for naturalization, achieved a "status" or "condition" within 1952 act provision that act should not affect any existing status or condition, alien's inchoate right to be naturalized under 1940 nationality act, which made no provision for any period of physical presence but did require five years' continuous residence, was preserved by saving clause and alien, who was transferred to his employer's office in foreign country in 1954 and who filed petition for naturalization in 1958, was entitled to be naturalized. Petition of Zaharia, D.C.N.Y., 166 F.Supp. 314, 318.

Terms

Term "condition", within rule of construction relating to whether words of contract create promise or an express condition, does not mean a mere term, expression, provision, or any particular group of words used in a contract, but is an operative fact or event, an act or performance by a promisee upon which existence of some particular legal relationship depends. Prager's, Inc. v. Bullitt Co., 463 P.2d 217, 222, 1 Wash.App. 575.

A "condition" is an uncertain event, whereas the "term" is an event which is bound to take place, even though it is not known when. In re Los Colinas, Inc., D.C.Puerto Rico, 294 F.Supp. 582, 602.

Warranties

Provision of burglary policy that assured would maintain protective devices was "promissory warranty" as well as "condition". Phoenix Ins. Co. v. Ross Jewelers, Inc., C.A.Ala., 362 F.2d 985, 988.

In view of fact that premium paid by owners of jewelry store for burglary insurance was based upon proposal as to what percentage of insured property would be kept locked in the safe when the store was closed, owners' warranty to keep sixty-five percent by value of insured property in store's safe when store was closed constituted "promissory warranty" and "condition", and owners who failed to comply with warranty were not entitled to recover under policy value of property lost in burglary. Great Am. Ins. Co. v. Lang, Tex.Civ.App., 416 S.W.2d 541, 553.

CONDITIONAL

See, also,

Fee Simple Conditional.

A guaranty is "conditional" if as a condition to liability on part of guarantor the happening of some contingent event, other than default of principal debtor, or performance of some act on part of creditor is required. Hawaii Leasing v. Klein, 698 P.2d 309, 313, 5 Haw.App. 450.

Where guarantor's liability under agreement guaranteeing lease was contingent upon lessee's selling leased equipment should lessee default, subject to right of guarantors or lessees who initially sell equipment in minimum period of 30 days after default, contract of guaranty was "conditional." Id.

A privilege is "conditional" because of requirements that declaration be reasonably calculated to accomplish the privileged purpose and that it be made without malice. Hett v. Ploetz, 121 N.W.2d 270, 273, 20 Wis.2d 55.

Texas recognizes validity of "conditional" or "contingent will", defined as a will which is to take effect only upon happening of a specified contingency. In re Craft's Estate, Tex.Civ.App., 358 S.W.2d 732, 734.

Where one accepts a check and note under agreement that specific, named contingency must be fulfilled before the instruments are to become payable, delivery of the check and note is "conditional" within uniform negotiable instruments law. Flaxmayer v. Snyder, 439 P.2d 545, 7 Ariz.App. 382.

Statute providing that as between immediate parties, and as regards a remote party other than a holder in due course, delivery of instrument may be shown to have been "conditional", does not include conditions which concede transfer of property in instrument and merely restrict source of payment. Oakland Medical Bldg. Corp. v. Aureguy, 261 P.2d 249, 250, 41 C.2d 521.

Alleged oral agreement between officer and principal stockholder of two corporations and first corporation's creditor that second corporation would advance $5,000 to creditor and that $5,000 was to be repaid by creditor only on receipt by him of $10,000 owing him by first corporation did not render delivery of $5,000 note to second corporation for $5,000 advance "conditional" within meaning of statute providing that as between immediate parties, and as regards a remote party other than a holder in due course, delivery of instrument may be shown to have been "conditional". Id.

If accused, after being informed that hybrid representation is not permissible option, continues to insist on conducting his own defense, but only with selective aid of counsel, it may be said that his assertion of right to self-representation is "conditional," and thus equivocal, and at that point trial court may deny right to self-representation. Scarbrough v. State, Tex.Cr.App., 777 S.W.2d 83, 93.

If accused, after being denied access to law books and law library due to concerns about potential delay, demands both self-representation and access to legal resources, it may be concluded that his invocation of right to self-representation is "conditional" and hence equivocal, and then trial court may deny right to self-representation. Id.

An interest may be "conditional" so that it is not deductible under provision of the Internal Revenue Code authorizing deduction for federal estate tax purposes of bequests or transfers exclusively for religious, charitable, scientific, literary, or educational purposes, because, though vested, it is subject to being divested by a gift over. Polster's Estate v. C. I. R., C.A.4, 274 F.2d 358, 362, 363, 365.

Question whether gift to charity is conditional, so that it is not deductible under provision of Internal Revenue Code authorizing deduction for federal estate tax purposes of bequests or transfers exclusively for religious, charitable, scientific, literary, or educational purposes, is tested by general and practical considerations of fact arising in each particular case and does not turn on whether interest in property is vested or contingent or whether condition on which bequest depends is precedent or subsequent under technical rules of property law, but if, under state property law, there is almost no possibility that anyone other than named charitable beneficiary will take gift, then it is not "conditional" as a practical matter. Id.

APPENDIX 13

They are *possible* or *impossible*: the former when they admit of performance in the ordinary course of events; the latter when it is contrary to the course of nature or human limitations that they should ever be performed.

They are *lawful* or *unlawful*: the former when their character is not in violation of any rule, principle, or policy of law; the latter when they are such as the law will not allow to be made.

They are *consistent* or *repugnant*: the former when they are in harmony and concord with the other parts of the transaction; the latter when they contradict, annul, or neutralize the main purpose of the "contract". Repugnant conditions are also called "insensible".

They are *affirmative* or *negative*: the former being a condition which consists in doing a thing, as provided that the lessee shall pay rent, etc.; the latter being a condition that consists in not doing a thing, as provided that the lessee shall not alien, etc.

They are *precedent* or *subsequent*. A condition precedent is one which must happen or be performed before the estate to which it is annexed can vest or be enlarged; or it is one which is to be performed before some right dependent thereon accrues, or some act dependent thereon is performed. A fact other than mere lapse of time which must exist or occur before a duty of immediate performance of a promise arises. U. S. v. Schaeffer, C.A.Wash., 319 F.2d 907, 911. A "condition precedent" is one that is to be performed before the agreement becomes effective, and which calls for the happening of some event or the performance of some act after the terms of the contract have been arrested on, before the contract shall be binding on the parties; *e.g.* under disability insurance contract, insured is required to submit proof of disability before insurer is required to pay. Sherman v. Metropolitan Life Ins. Co., 297 Mass. 330, 8 N.E.2d 892. A condition subsequent is one annexed to an estate already vested, by the performance of which such estate is kept and continued, and by the failure or non-performance of which it is defeated; or it is a condition referring to a future event, upon the happening of which the obligation becomes no longer binding upon the other party, if he chooses to avail himself of the condition. Co.Litt. 201; Carroll v. Carroll's Ex'r, 248 Ky. 386, 58 S.W.2d 670, 672. A condition subsequent is any condition which divests liability which has already attached on the failure to fulfill the condition as applied in contracts, a provision giving one party the right to divest himself of liability and obligation to perform further if the other party fails to meet condition, *e.g.*, submit dispute to arbitration. In property law, a condition which causes defeasance of estate on failure to perform, *e.g.* fee simple on condition. In lease, a provision giving lessor right to terminate for tenant's failure to perform condition.

Conditions may also be *positive* (requiring that a specified event shall happen or an act be done) and *restrictive* or *negative*, the latter being such as impose an obligation not to do a particular thing, as, that a lessee shall not alien or sub-let or commit waste, or the like.

They may be *single*, *copulative*, or *disjunctive*. Those of the first kind require the performance of one specified thing only; those of the second kind require the performance of divers acts or things; those of the third kind require the performance of one of several things.

Conditions may also be *independent*, *dependent*, or *mutual*. They belong to the first class when each of the two conditions must be performed without any reference to the other; to the second class when the performance of one condition is not obligatory until the actual performance of the other; and to the third class when neither party need perform his condition unless the other is ready and willing to perform his or, in other words, when the mutual covenants go to the whole consideration on both sides and each is precedent to the other.

The following varieties may also be noted: A condition *collateral* is one requiring the performance of a collateral act having no necessary relation to the main subject of the agreement. A *compulsory* condition is one which expressly requires a thing to be done, as, that a lessee shall pay a specified sum of money on a certain day or his lease shall be void. *Concurrent* conditions are those which are mutually dependent and are to be performed at the same time or simultaneously. A condition *inherent* is one annexed to the rent reserved out of the land whereof the estate is made, or rather, to the estate in the land, in respect of rent.

French law. Conditions in French law are of the following types:

The following peculiar distinctions are made: (1) A condition is *casuelle* when it depends on a chance or hazard; (2) a condition is *potestative* when it depends on the accomplishment of something which is in the power of the party to accomplish; (3) a condition is *mixte* when it depends partly on the will of the party, and partly on the will of others; (4) a condition is *suspensive* when it is a future and uncertain event, or present but unknown event, upon which an obligation takes or fails to take effect; (5) a condition is *resolutoire* when it is the event which undoes an obligation, which has already had effect as such.

Synonymous distinguished. A "condition" is to be distinguished from a *limitation*, in that the latter may be to or for the benefit of a stranger, who may then take advantage of its determination, while only the grantor, or those who stand in his place, can take advantage of a condition. Also, a limitation ends the estate without entry or claim, which is not true of a condition. It also differs from a *conditional limitation*. In determining whether, in the case of estates greater than estates for years, the language constitutes a "condition" or a "conditional limitation," the rule applied is that, where an estate is so expressly limited by the words of its creation that it cannot endure for any longer time than until the condition happens on which the estate is to fail, this is limitation, but when the estate is expressly granted on condition in deed, the law permits it to endure beyond the time of the contingency happening, unless the grantor takes advantage of the breach of condition by making entry. It differs also from a *covenant*, which can be made by either grantor or grantee, while only the grantor can make a condition. The chief distinction between a condition subsequent in a deed and a covenant pertains to the remedy in event

Black's Law Dictionary, 5th Edition, 1979

Condictio /kandi(k)sh(iy)ow/. In Roman law, a general term for actions of a personal nature, founded upon an obligation to give a certain and defined thing or service. It is distinguished from *vindicatio rei*, which is an action to vindicate one's right of property in a thing by regaining (or retaining) possession of it against the adverse claim of the other party.

Condictio certi /kandi(k)sh(iy)ow sárday/. An action which lies upon a promise to do a thing, where such promise or stipulation is certain *(si certa sit stipulatio)*.

Condictio ex lege /kandi(k)sh(iy)ow èks liyjiy/. An action arising where the law gave a remedy, but provided no appropriate form of action.

Condictio indebitati /kandi(k)sh(iy)ow andèbatéyday/. An action which lay to recover anything which the plaintiff had given or paid to the defendant, by mistake, and which he was not bound to give or pay, either in fact or in law.

Condictio rei furtivæ /kandi(k)sh(iy)ow riyay fartáyviy/. An action which lay to recover a thing stolen, against the thief himself, or his heir.

Condictio sine causa /kandi(k)sh(iy)ow sáyniy kóza/. An action which lay in favor of a person who had given or promised a thing without consideration *(causa)*.

Conditio /kandish(iy)ow/. Lat. A condition.

Conditio beneficialis, quæ statum construit, benigne secundum verborum intentionem est interpretanda; odiosa autem, quæ statum destruit, stricte secundum verborum proprietatem accipienda /kandish(iy)ow bènəfishiyéylas kwiy stéydəm kónstruwət banígniy sakándəm varbóram intènshiyównəm èst intərprətándə; òwdiyówsə ódəm, kwiy stéydəm déstruwət, stríktiy sakándəm varbóram prəpràyətéydəm aksipiyéndə/. A beneficial condition, which creates an estate, ought to be construed favorably, according to the intention of the words; but a condition which destroys an estate is odious, and ought to be construed strictly according to the letter of the words.

Conditio dicitur, cum quid in casum incertum qui potest tendere ad esse aut non esse, confertur /kandish(iy)ow dísədər kàm kwíd in kéysəm insárdəm kwày pówdəst téndəriy àd ésiy òt nón èsiy kənfárdər/. It is called a "condition" when something is given on an uncertain event, which may or may not come into existence.

Conditio illicita habetur pro non adjecta /kandish(iy)ow alísədə həbiydər pròw non ajékta/. An unlawful condition is deemed as not annexed.

Condition. A future and uncertain event upon the happening of which is made to depend the existence of an obligation, or that which subordinates the existence of liability under a contract to a certain future event. Provision making effect of legal instrument contingent upon an uncertain event. See also **Constructive condition; Contingency; Contingent; Proviso.**

A clause in a contract or agreement which has for its object to suspend, rescind, or modify the principal obligation, or, in case of a will, to suspend, revoke, or modify the devise or bequest. A qualification, restriction, or limitation modifying or destroying the original act to which it is connected; an event, fact, or the like that is necessary to the occurrence of some other, though not its cause; a prerequisite; a stipulation.

A qualification or restriction annexed to a conveyance of lands, whereby it is provided that in case a particular event does or does not happen, or in case the grantor or grantee does or omits to do a particular act, an estate shall commence, be enlarged, or be defeated.

An "estate on condition" arises where an estate is granted, either in fee simple or otherwise, with an express qualification annexed, whereby the estate granted shall either commence, be enlarged, or be defeated, upon performance or breach of such qualification or condition.

In insurance parlance, the printed conditions on the inside of the policy which serve generally as a limitation of risk or of liability or impose various conditions requiring compliance by the insured.

Mode or state of being; state or situation; essential quality; property; attribute; status or rank.

Civil law. Conditions in the civil law are of the following types:

The *casual* condition is that which depends on chance, and is in no way in the power either of the creditor or of the debtor. Civ.Code La. art. 2023.

A *mixed* condition is one that depends at the same time on the will of one of the parties and on the will of a third person, or on the will of one of the parties and also on a casual event. Civ.Code La. art. 2025.

The *potestative* condition is that which makes the execution of the agreement depend on an event which it is in the power of the one or the other of the contracting parties to bring about or to hinder. Civ. Code La. art. 2024.

A *resolutory* or *dissolving* condition is that which, when accomplished, operates the revocation of the obligation, placing matters in the same state as though the obligation had not existed. It does not suspend the execution of the obligation. It only obliges the creditor to restore what he has received in case the event provided for in the condition takes place. Civ.Code La. art. 2045.

A *suspensive* condition is that which depends, either on a future and uncertain event, or on an event which has actually taken place, without its being yet known to the parties. In the former case, the obligation cannot be executed till after the event; in the latter, the obligation has its effect from the day on which it was contracted, but it cannot be enforced until the event be known. Civ.Code La. art. 2043; New Orleans v. Railroad Co., 171 U.S. 312, 18 S.Ct. 875, 43 L.Ed. 178. A condition which prevents a contract from going into operation until it has been fulfilled.

Classification. Conditions are either *express* or *implied*, the former when incorporated in express terms in the deed, contract, lease, or grant; the latter, when inferred or presumed by law, from the nature of the transaction or the conduct of the parties, to have been tacitly understood between them as a part of the agreement, though not expresaly mentioned.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 651—August Term 1989

Submitted: March 1, 1990 Decided: June 22, 1990
Docket No. 89-2389

JOHN J. MCCARTHY,
Plaintiff-Appellant,
—v.—
GEORGE BRONSON, WARDEN, LT. STEVE T. OZIER, OFFICER PAUL LUSA, and OFFICER MICHIEWICZ, Individually and in their official capacities as Officers of the Connecticut Department of Correction,
Defendants-Appellees.

Before:

OAKES, *Chief Judge*,
NEWMAN and WALKER, *Circuit Judges*.

Appeal from the June 19, 1989, judgment of the District Court for the District of Connecticut (José A. Cabranes, Judge) in a suit brought under 42 U.S.C.

§ 1983 (1982) alleging unlawful removal of plaintiff from his cell and use of excessive force.

Affirmed.

JOHN J. MCCARTHY, Leavenworth, Kan., submitted a *pro se* brief *for plaintiff-appellant*.

CLARINE NARDI RIDDLE, Atty. Gen., Steven R. Strom, Asst. Atty. Gen., Hartford, Conn., submitted a brief *for defendants-appellees*.

JON O. NEWMAN, *Circuit Judge*:

John J. McCarthy, a state prisoner, appeals *pro se* from the June 19, 1989, judgment of the District Court for the District of Connecticut (José A. Cabranes, Judge) in favor of the defendant state prison officials. McCarthy sued under 42 U.S.C. § 1983 (1982), alleging unlawful removal from his cell and use of excessive force. The judgment was entered after a hearing conducted by Magistrate F. Owen Eagan. The case is complicated by some uncertainty as to the authority of the Magistrate in recommending proposed findings to the District Judge and the authority of the District Judge in approving those recommended findings. The appeal challenges procedural irregularities concerning the reference to the Magistrate, the lack of a jury trial, the denial of a free copy of a hearing transcript, and the merits of the fact-finding. We affirm.

Before setting forth the procedural facts, it will be helpful to outline pertinent provisions of the Federal Magistrates Act, 28 U.S.C. §§ 631-39 (1982 & Supp. V 1987). Four types of reference from a district judge to a magistrate are implicated in this case. First, subsection 636(b)(1) permits a judge to designate a magistrate to handle pretrial matters, with the Magistrate authorized by subsection 636(b)(1)(A) to rule on most pretrial motions and authorized by subsection 636(b)(1)(B) to recommend rulings on motions excepted from subsection 636(b)(1)(A). Second, subsection 636(b)(1)(B) also permits a judge to designate a magistrate "to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court . . . of prisoner petitions challenging conditions of confinement." Third, subsection 636(b)(2) permits a judge to designate a magistrate "to serve as a special master pursuant to the applicable provisions of [Title 28] and the Federal Rules of Civil Procedure." This subsection also permits a judge to designate a magistrate to serve as a special master in any civil case, upon consent of the parties, without regard to Fed. R. Civ. P. 53(b), which limits use of a master to exceptional cases. Fourth, subsection 636(c) permits a magistrate, upon consent of the parties, to try any civil case and render a judgment.

Background

Plaintiff's original complaint, filed in April, 1983, alleged that various officials at the Connecticut Correctional Institution at Somers had ordered or carried out his forcible removal from his prison cell by means of tear gas and excessive force, in violation of the Eighth

and Fourteenth Amendments. The complaint named only Warden Robinson as a defendant and made no demand for a jury trial. Shortly after the complaint was filed, Judge Cabranes referred the case to Magistrate Eagan for pretrial proceedings under 28 U.S.C. § 636(b)(1)(A), a reference that was soon broadened. On February 28, 1985, in open court the plaintiff and defendant's counsel executed a standard consent form, agreeing to have the case tried by a magistrate, pursuant to 28 U.S.C. § 636(c), and electing to take any appeal from the magistrate's judgment to the district judge, pursuant to § 636(c)(4). At that time, the Magistrate explained to McCarthy that the trial would be held by the Magistrate at Somers Prison without a jury. McCarthy did not object. Conducting non-jury trials at the prison frequently benefits a prisoner-claimant, since witnesses and documents, needed unexpectedly, are more accessible. On March 5, 1985, Judge Cabranes entered an order referring the case to Magistrate Eagan "for all further proceedings and the entry of judgment in accordance with Title 28, § 636(c)."

On April 12, 1985, McCarthy filed an amended complaint. This complaint added several defendants but did not alter the substantive allegations. It made no jury demand. On July 2, 1985, he filed a second amended complaint, again adding parties but not altering his substantive allegations. This complaint contained a jury demand. Defendants filed their answer to the second amended complaint on August 26, 1985. No answer had been filed to the prior complaints.

On October 23, 1986, defendants filed papers opposing plaintiff's jury demand, contending, among other things, that McCarthy had agreed to a non-jury trial

before the Magistrate on February 28, 1985. On December 22, 1986, Judge Cabranes ruled that plaintiff was not entitled to a jury trial; he relied on the absence of a timely jury demand, *see* Fed. R. Civ. P. 38(b), (d), and noted that the right to a jury trial, once waived, is not revived by an amended complaint that raises no new issues, *see Lanza v. Drexel & Co.*, 479 F.2d 1277, 1310-11 (2d Cir. 1973) (in banc). On October 22, 1987, McCarthy moved for a jury trial; the Magistrate recommended denial based on the District Judge's 1986 ruling, and Judge Cabranes adopted this recommendation on January 29, 1988.

On March 24, 1988, plaintiff appeared before the Magistrate for a bench trial at Somers Prison. At the start of the trial, the Magistrate sought a second written consent to proceed under subsection 636(c), even though a first consent had been executed on February 28, 1985. McCarthy refused. Apparently, the Magistrate construed McCarthy's refusal to sign the second consent form as a motion to withdraw the original consent and granted the motion. Magistrate Eagan then conducted an eight-day trial at the conclusion of which he issued a decision entitled "Recommended Findings of Fact and Memorandum of Decision." He recommended detailed findings of fact and ultimate conclusions that excessive force had not been used and that no unlawful action had occurred. When the matter reached the District Court, Judge Cabranes accepted the recommended findings and ordered judgment for the defendants. His endorsement of the Magistrate's proposed findings reflected the Judge's understanding that the matter had been referred under subsection 636(b)(1), *i.e.*, referred for recommended findings. However, in ruling on post-judgment motions, Judge Cabranes amended the citation to sub-

but does refer to "petitions under section 1983 of Title 42." H.R. Rep. No. 1609, 94th Cong., 2d Sess. 11, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6162, 6171. Most courts have construed the phrase broadly to include almost any complaint made by a prisoner against prison officials, *see Branch v. Martin*, 886 F.2d 1043, 1045 n.1 (8th Cir. 1989) (collecting cases). However, there is a minority view that has focused on the phrase "conditions of confinement" and concluded that it covers only challenges to pervasive prison conditions and excludes claims concerning specific episodes of misconduct by prison officials. *See e.g., Houghton v. Osborne*, 834 F.2d 745 (9th Cir. 1987); *Hill v. Jenkins*, 603 F.2d 1256, 1259 (7th Cir. 1979) (Swygert, J., concurring).

We see no reason why a Magistrate with clear authority to hold hearings and recommend findings as to the unconstitutionality of continuing prison conditions may not perform a similar function as to specific episodes of unconstitutional conduct by prison officials. The phrase "conditions of confinement" appears not to have been selected as a limitation to preclude episodes of misconduct, but rather as a generalized category covering all grievances occurring during prison confinement. This meaning emerges from comparing the phrase with the immediately preceding category in subsection 636(b)(1)(B) that covers "applications for posttrial relief made by individuals convicted of criminal offenses." Congress evidently wished magistrates to assist district judges with respect to all prisoner claims and selected phrases to describe the two broad categories of prisoner claims cognizable under 28 U.S.C. §§ 2254, 2255 (challenges to convictions) and 42 U.S.C. § 1983 (challenges

to conditions of confinement). *See generally Preiser v. Rodriguez*, 411 U.S. 475 (1973).

The Magistrate was therefore entitled to hold a hearing on McCarthy's complaint and submit recommended findings to the District Judge.

2. *The Authority of the District Judge.* After initially viewing the Magistrate's proposed findings as submitted under subsection 636(b)(1) and adopting them, Judge Cabranes altered his view in his post-judgment ruling and considered the Magistrate's findings to be "essentially" those of a special master acting under subsection 636(b)(2). Then, explicitly referring to Rule 53(e)(2) of the Federal Rules of Civil Procedure, governing judicial consideration of a master's findings in a nonjury case, the District Judge accepted the findings as not clearly erroneous, the standard under Rule 53(e)(2). Had the Judge stopped there, his ruling would have been infirm for two reasons.

First, the Magistrate made and forwarded his findings under subsection 636(b)(1), and that subsection requires *de novo* review of any proposed findings to which objection was made. Though we are confident that the Magistrate would exercise the same high degree of care and conscientiousness whether his findings were to be reviewed *de novo* or under a clearly erroneous standard, we would have considerable doubt whether proposed findings made in the expectation of plenary review would be valid, absent reassessment by the recommender, if in fact they received review only under a less rigorous standard. Second, we would also doubt whether this fairly straightforward section 1983 suit would qualify for reference to a special master under the exacting

section 636(b)(1) and stated that after allowing the plaintiff to withdraw his consent, Magistrate Eagan had "essentially act[ed] as a special master pursuant to his powers under 28 U.S.C. § 636(b)(2) and Rule 1(C)(5) of the Local Rules." Judge Cabranes then adopted the Magistrate's recommended findings, acting under Fed. R. Civ. P. 53(e)(2), which requires a district judge to accept a special master's findings of fact unless clearly erroneous. Finally, the District Judge added, "Even upon a *de novo* determination I would reach the same conclusions as the Magistrate." All motions for post-judgment relief were denied.

Discussion

The tangled sequence of events has created some problems, but none that impairs the validity of the judgment rejecting plaintiff's claims on their merits.

1. *The Authority of the Magistrate.* The parties' February 28, 1985, consent to have the matter tried by the Magistrate pursuant to subsection 636(c) was entirely valid. Once given, that consent may be withdrawn on the Court's own motion "for good cause shown" or on request of a party who shows "extraordinary circumstances" warranting such relief. 28 U.S.C. § 636(c)(6); *see Fellman v. Fireman's Fund Insurance Co.*, 735 F.2d 55, 57-58 (2d Cir. 1984). No such circumstances existed in this case. The Magistrate therefore could have proceeded under the original 636(c) reference, made findings, and entered judgment. However, he elected not to do so, preferring instead to permit McCarthy to withdraw consent to the 636(c) reference.

Having vacated the 636(c) reference, the Magistrate then used the authority of subsection 636(b)(1)(B) to conduct a hearing and recommend proposed findings of fact concerning "prisoner petitions challenging conditions of confinement." Whether he acted permissibly is our initial inquiry. The matter had originally been referred to the Magistrate for pretrial purposes, under the authority of subsections 636(b)(1)(A) and (B). Arguably, vacating the 636(c) reference left the Magistrate with only the pretrial assignment he had originally been given, but we do not think he was required to take such a narrow view of his authority. With complete propriety, he could have declined to vacate the 636(c) consent and adjudicated the merits definitively. He was surely entitled to take the lesser step of hearing the evidence and submitting recommended findings to the District Judge. The parties' consent is not required for using that procedure, and it is obvious, from the District Judge's subsequent approval of the Magistrate's findings, that the Judge welcomed the Magistrate's help. It would be a needless ritual now to require the District Judge formally to refer the matter under the "prisoner petition" clause of subsection 636(b)(1)(B). The Judge's adoption of the recommended findings demonstrates that the Magistrate was acting entirely in conformity with authority the Judge wished him to exercise.

A more substantial question is whether McCarthy's lawsuit is a petition "challenging the conditions of confinement" within the meaning of subsection 636(b)(1)(B). Subsection 636(b)(1)(B) was added in 1976 as part of a broadening of the authority of magistrates. Act of Oct. 21, 1976, Pub. L. 94-577, 90 Stat. 2729. The House Report does not explain the category "prisoner petitions challenging conditions of confinement"

standards of Rule 53(b) (in nonjury matters "a reference shall be made only upon a showing that some exceptional condition requires it" except where a claim requires an accounting or a difficult computation of damages).

Fortunately, the District Judge did not confine his review to the narrow scope appropriate for findings of a special master. Judge Cabranes explicitly determined that upon a *de novo* determination he "would reach the same conclusions as the Magistrate regarding the matters to which there has been objection." This confirmation of the discharge of his responsibilities, as he had originally exercised them under subsection 636(b)(1) when he first adopted the proposed findings, eliminates all question as to the validity of the findings.

3. *Waiver of Jury Trial.* McCarthy contends that he was entitled to a jury trial and never waived this right. The District Judge denied McCarthy a jury on the ground that he had not made a timely demand, pointing out that the initial complaint did not claim a jury and that the second amended complaint, making the demand, added no new substantive allegations. The Civil Rules require a demand for jury trial on an issue no later than ten days "after the service of the last pleading directed to such issue." Fed. R. Civ. P. 38(b). Failure to make a timely demand constitutes a waiver. *Id.* 38(d). However, "the last pleading directed to" an issue is not the pleading that raises the issue, it is the pleading that contests the issue. Normally, that pleading is an answer, or, with respect to a counterclaim, a reply, *id.* Rule 12(a); *see* 5 *Moore's Federal Practice* ¶ 38.39[2], at 38-367 (2d ed. 1988). In this case, no answer was filed to either the original complaint or the

first amended complaint. The answer to the second amended complaint was not filed until August 26, 1985, after plaintiff had made a jury demand. There was thus no waiver by reason of a late demand.

Nor, as the defendants contend, relying on *Lovelace v. Dall*, 820 F.2d 223, 227-29 (7th Cir. 1987), was there a waiver because McCarthy did not object to proceeding without a jury at the start of the hearing before the Magistrate. *See also Royal American Managers, Inc. v. IRC Holding Corp.*, 885 F.2d 1011, 1018-19 (2d Cir. 1989). *Lovelace* deemed the plaintiff to have acceded to a bench trial by not objecting at its start, but the case differs significantly from ours because the issue of entitlement to a jury was never litigated. By contrast, McCarthy's jury claim was challenged by the defendants and adjudicated by the District Court. Once that adverse ruling was made, McCarthy was not required to renew his jury demand at the start of the Magistrate's hearing in 1988.

Nevertheless, the defendants are correct in urging that McCarthy waived entitlement to a jury in the proceedings before the Magistrate in 1985 when he consented to proceeding under subsection 636(c). At that time, the Magistrate explained to McCarthy in open court that the proceedings would be conducted at the prison as a bench trial without a jury. With that understanding, McCarthy agreed to the subsection 636(c) procedure. This agreement was consent to a non-jury trial under Rule 39(a). The fact that the Magistrate, three years later, permitted McCarthy to renege on his agreement to have the issues tried by the Magistrate under subsection 636(c) and instead made recommended findings subject to *de novo* review by the District Judge under subsection

636(b)(1) does not undermine the waiver of a jury. McCarthy, though not entitled to any change, succeeded in changing the identity of the judicial officer with final fact-finding responsibility; he did not thereby rescind his consent to have the facts found by a judicial officer.

Nor is the waiver invalid because it occurred prior to the defendants' answer. There is no starting time for jury waivers. They may be agreed to even before a lawsuit arises. *See Rodenbur v. Kaufmann*, 320 F.2d 679, 683-84 (D.C. Cir. 1963). Though a litigant might have a basis for obtaining relief from a jury waiver where a subsequent pleading alters the nature of the issue to be decided from what it appeared to be at the time of the waiver, the defendants' answer here had no such effect.

4. *Free Transcript.* Judge Cabranes denied plaintiff's request for a free transcript of the hearing before the Magistrate, relying on 28 U.S.C. § 753(f) (free transcripts not required where issues frivolous). Though the procedural issues in this case are not frivolous, their resolution does not require examination of the evidence presented at the hearing before the Magistrate, and it was not error to deny McCarthy a free copy of the transcript of that hearing.

5. *Fact-finding.* McCarthy's challenge to the fact-finding is without substance. He contends that prison officers planted a knife in his cell as a pretext to remove him. The Magistrate and the District Judge were entitled to reject this claim.

We have considered McCarthy's remaining contentions and find them without merit. The judgment of the District Court is affirmed.

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